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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

L VICTORIÆ.

[IN THE COURT OF APPEAL.]

1886
Aug. 5, 6;
Nov. 12.

GOLDSTROM *v.* TALLERMAN.
HARRIS (CLAIMANT).

Bill of Sale—Validity—Repayment of Debt by Instalments—Interest upon Interest—Power to Grantee to pay Rent and Taxes and Premiums of Insurance—Charge of Payments on assigned Chattels—Postponement of Redemption—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule.*

By a bill of sale goods were assigned as security for the repayment of 500*l.* and interest thereon at the rate of 60*l.* per cent. per annum, and the grantor agreed to pay "the principal sum aforesaid, together with the interest then due, by twelve equal monthly payments of 41*l.* 13*s.* 4*d.*, until the whole of the said sum and interest shall be fully paid," and that in default of payment of any "instalment" then the grantor would pay interest thereon at the rate aforesaid from the date when such instalment should become due until full payment thereof. The grantor also agreed (inter alia) to insure the assigned goods, and pay all premiums, and that upon default the grantee might do so and "charge the costs thereof, with interest at the rate of 20 per cent. per annum," to the grantor, and that the same should be considered to be included in the security, and that the grantee might pay all rent, rates, and taxes at any time due in respect of the messuage in which the goods might be, and that thereupon all such payments made by the grantee, together with interest at the

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rate of 20 per cent. per annum, should be a charge on the goods, which should not be redeemed until full payment of all such sums and interest :—

Held, that upon the true construction of the bill of sale interest upon interest was not reserved, but that the word "instalment" referred only to the monthly payments of principal :

Held, also, that the form of bill of sale in the schedule to the Bills of Sale Act, 1882, does not require that the payments of interest should be always of equal amount, and that therefore the bill of sale was not void on the ground that the payments of interest would vary in amount from time to time.

Held, also, on the authority of *Ex parte Stanford* (17 Q. B. D. 259), that the provisions for the payment of rent, rates, taxes and premiums by the grantee, and the charge of the sums so paid by him upon the goods, did not render the bill of sale void.

Judgment of Queen's Bench Division (17 Q. B. D. 80) that the bill of sale was void reversed.

APPEAL from the decision of a Divisional Court (17 Q. B. D. 80), upon an interpleader issue to try the validity of a bill of sale, that the bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

The provisions of the bill of sale and the nature of the arguments adduced upon the hearing of the appeal are so fully set forth in the judgment of the Court, that it is unnecessary to state them here.

Aug. 5, 6. *Cooper Willis, Q.C., Ringwood,* and *Hansell,* for the appellant.

Lionel Hart, for the execution creditor.

Cooper Willis, in reply.

The arguments were in substance the same as in the Divisional Court. In addition to the cases there referred to *Hughes* v. *Little* (1) was cited.

Cur. adv. vult.

Nov. 12. FRY, L.J., read the written judgment of the Court (Lord Esher, M.R., and Bowen and Fry, L.JJ.), as follows :—

This appeal arises upon an interpleader issue, and its decision turns on the validity or invalidity of a bill of sale. On the trial of the issue the claimant, Harris, put in evidence the bill of sale in question, which bears date the 21st of July, 1885, and was made between the defendant, Tallerman, of the one part, and the

(1) 17 Q. B. D. 204.

claimant, Harris, of the other part, and which contains an assignment by Tallerman to Harris of certain scheduled chattels. The provisions of this instrument with regard to the repayment of the principal and the payment of interest give rise to the first objection to its validity. After the assignment of the chattels the deed proceeds in the following words:—

"To hold the same by way of security for payment in manner hereinafter appearing of the sum of 500*l.* and interest thereon at the rate of 60*l.* per cent. per annum. And the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid with the interest then due, by twelve equal monthly payments of 41*l.* 13*s.* 4*d.* on the 21st day of August now next, and 41*l.* 13*s.* 4*d.* on the 21st day of each and every succeeding month, until the whole of the said sum and interest shall be fully paid, and in default of payment of any instalment then that he, the mortgagor, will pay interest thereon at the rate aforesaid, from the date when such instalment shall become due until full payment thereof."

Upon these provisions it has been argued in the first place that they involve a stipulation for the payment of interest upon interest, and that this is not in accordance with the form given in the Act of 1882. This argument is based on the suggestion that the words "and in default of payment of any instalment," following as they do an agreement to pay both principal and interest, relate to both principal and interest, and consequently that the default in payment of interest would create an obligation to pay interest on interest so in arrear. But in our opinion this argument is not tenable. In the first place, the word "instalment" is, we think, properly applicable to the sum of 41*l.* 13*s.* 4*d.*, the twelfth part of the principal sum of 500*l.*, and does not describe or apply to a payment of interest. In the next place, it appears to us that the whole clause as to the modes and times of payment is governed by the words in the habendum, shewing for what the deed is a security, namely, for 500*l.* and interest on 500*l.* at 60*l.* per cent. per annum, and for nothing more, and, therefore, not for interest on interest. Moreover, the object of the last clause which we have cited, stipulating for interest till the actual time of payment in the event of default of payment of any instalment

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is, we think, sufficiently obvious, and has nothing to do with compound interest. It is well known that a contract to pay a sum of principal on a given day, and interest up to that given day at a stipulated rate, is not a contract to pay interest at that rate after that day; and, consequently, if default is made in payment on that day, there is no express or implied contract for payment of subsequent interest at the rate previously mentioned; and, but for the clause in question, it would have been competent for a jury to give interest only at 4 or 5 per cent. per annum after the day fixed for payment, instead of 60 per cent. per annum. This point is illustrated by *Cook* v. *Fowler* (1), and the clause in question is, in our opinion, inserted merely to give the lender a right to 60 per cent. per annum on the principal sum unpaid between the date fixed for payment and the actual day of payment.

In the next place, this argument has been adduced. It is said that the deed in question provides for the payment in each month of an equal sum for principal, but of diminishing, and, therefore, unequal, sums for interest; that the form of a bill of sale in the Act of 1882 provides for the payment of principal and interest by equal sums representing both principal and interest; and, consequently, that the bill of sale in question is not in accordance with the statutory form. Such is the argument. But does the statutory form provide for such a payment as is thus suggested? The words in the form are these:—

"And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal —— payments of £—— on the —— day of —— [*or whatever else may be the stipulated times or time of payment*]"

It is argued that, according to this form, the whole principal and interest must be ascertained once for all, and the periodical sum fixed which will satisfy both principal and interest by equal sums, the relative proportion of principal and interest varying in each payment, the principal increasing as the interest diminishes. Such a mode of payment is well known in the case of building societies. But, in our opinion, the statutory form does not require

(1) Law Rep. 7 H. L. 27

such a mode of payment. It is suggested that the form requires the computation of the whole interest on the principal at once, the addition of this sum to the principal, and the division of such total sum into the stipulated number of instalments. But, in our opinion, the word "then," in the phrase "interest then due," excludes any such construction, for the interest is certainly not due when it is supposed that the addition should take place; on the contrary, we think that the words "together with the interest then due" are parenthetic, and that the word "then" is used in anticipation of the dates for payment thereafter given; so that, in fact, those words may be properly transposed and placed after the stipulation for payment of principal, and the whole sentence would then run thus:—"He will duly pay the principal sum aforesaid by equal —— payments on the —— day of ——, together with the interest due at the respective times of payment of the instalments of the principal." Taking this view of the statutory form, we think that the argument under consideration fails.

Other objections were raised on subsequent provisions of the bill of sale. By this instrument the mortgagor agreed to pay the rent, rates, and taxes of any messuage or premises wherein the assigned chattels might be, and also to keep the chattels insured against fire in the sum of 1000*l.*; and that in default it should be lawful for the mortgagee to keep on foot the insurance, and to charge the costs, with interest at the rate of 20 per cent. per annum, to the mortgagor, and that the same should be considered to be included in the security. The bill of sale also gave the mortgagee power to pay all rent, rates, taxes, charges, assessments, and outgoings which might become due and payable in respect of the messuage and premises in which the chattels might be, and it provided that thereupon all such payments made by the mortgagee, together with interest at the rate of 20 per cent. per annum, should be a charge upon the assigned chattels, which should not be redeemed until full payment of all such moneys and interest. The mortgagor further covenanted that he would on demand repay to the mortgagee all such premiums and payments made, and all costs, charges, and expenses incurred by

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the mortgagee in manner aforesaid, with interest thereon at the last-mentioned rate. The document concludes with the usual proviso, that the assigned chattels should not be liable to seizure or to be taken possession of for any cause other than those specified in s. 7 of the Act of 1882. Are or are not these provisions justified by the power given in the statutory form to "insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security?" The statutory form contains no express provision for adding any further sum to the principal sum secured; and, thereupon, it has been argued before us that, while the covenant for payment of insurance, rent, rates, and taxes, and the permission to the mortgagee to pay them and require their repayment, may conduce to the maintenance of the security, the agreement to charge these sums on the assigned chattels, and, still more, the agreement to charge 20 per cent. per annum interest on these sums, on the chattels, are not conducive to the maintenance of the security; that the form in the Act contemplates a fixed principal sum repayable by equal instalments, whereas this bill of sale provides for successive increments to that sum, and for amounts of which the mortgagor may have no accurate knowledge; that the form in the Act and the 7th section both imply that a time must be provided for the repayment of the principal, and that there is in the bill of sale in question no time provided for the repayment of these additional capital sums, except it be on demand. These arguments appear to us to be not devoid of weight, but they are, in substance, the arguments which were presented to the Court of Appeal on the first hearing of the case of *Ex parte Stanford* (1), and by them rejected as erroneous. Between the bill of sale in that case and the bill of sale in the present case we can find no satisfactory distinction in reference to the provisions for the payment of insurance, and we think that the stipulation as to rent, rates, and taxes falls within the same conclusion. By the authority of *Ex parte Stanford* (1), we feel ourselves bound, more especially as there can be no doubt that since the date of that decision numerous bills of sale have

(1) 17 Q. B. D. 259.

been executed, which have, on the strength of that decision, incorporated similar provisions with regard to insurance.

In our opinion, therefore, all the objections to this bill of sale fail, and we think that the appeal should be allowed.

Solicitor for appellant: *Edward Lee.*

Solicitor for execution creditor: *Joseph Davis.*

W. L. C.

[IN THE COURT OF APPEAL.]

Oct. 28.

IN RE CARUS-WILSON AND GREENE.

Arbitration and Award—Valuation, Agreement to take Timber at—Umpire appointed on Difference between Valuers—Practice—Application to set aside Valuation as an Award.

On the sale of land one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation, and it was provided for the purpose of such valuation that each party should appoint a valuer, and the valuers thus appointed should, before they proceeded to act, appoint by writing an umpire, and that the two valuers, or, if they disagreed, their umpire, should make the valuation. The two valuers appointed being unable to agree, the umpire made the valuation:—

Held, affirming the judgment of the Queen's Bench Division, that such valuation was not in the nature of an award on an arbitration, and therefore an application to set it aside must be refused.

APPEAL from the judgment of the Queen's Bench Division (Field and Wills, JJ.), refusing an application to set aside an award.

The facts were as follows:—On a sale of land by Carus-Wilson to Greene, one of the conditions of sale was that the purchaser was to pay for the timber on the land at a valuation to be made in accordance with the following provision: "Each party shall appoint a valuer and give notice thereof by writing to the other party within fourteen days from the date of the sale. The valuers thus appointed shall, before they proceed to act, appoint by writing an umpire and the two valuers, or, if they disagree, their umpire shall make the valuation. Each party shall pay the charges of his own valuer, and one half the charges, if any, of the umpire. If either party shall neglect to appoint a valuer or

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to give notice to the other party within the time aforesaid, the valuer appointed by the other party shall make a valuation alone, which shall be binding on vendor and purchaser." Valuers were duly appointed by the parties under the condition, and the valuers not agreeing on the price of the timber the valuation was made by an umpire appointed by them.

The agreement for sale had been made a rule of court. The vendor being dissatisfied with the valuation applied to the Divisional Court to set it aside on various grounds, which they refused to do, holding that it was a mere valuation and not an award on an arbitration.

From this decision the vendor appealed.

Bucknill, Q.C., and *R. Vaughan Williams*, for the appellant. The umpire being appointed to settle a dispute which had arisen between the valuers of the respective parties, is in the position of an arbitrator, not of a mere valuer. This case resembles that of *Turner* v. *Goulden*. (1) It may be that the intention was not that he should hold a formal judicial inquiry, and hear witnesses, but that he should decide upon inspection, relying on his own skill and knowledge; but it does not necessarily follow from this that he was not an arbitrator. No action would lie against him for negligence or want of skill in the performance of his functions: *Pappa* v. *Rose* (2); *Tharsis Sulphur Company* v. *Loftus*. (3) There is no contractual relation between the umpire and either of the parties, and therefore he could not be sued, whereas a mere valuer would be liable to an action for negligence or incompetence as for a breach of the contract to bring due skill and care to the performance of his functions. These considerations tend to shew that the umpire was an arbitrator. They also cited *In re Dawdy* (4); *In re Hopper* (5); *Bos* v. *Helsham* (6); *Collins* v. *Collins* (7); *Stevenson* v. *Watson*. (8)

H. D. Greene, Q.C., and *J. D. S. Sim*, contrà, were not called upon.

(1) Law Rep. 9 C. P. 57.
(2) Law Rep. 7 C. P. 32, 525.
(3) Law Rep. 8 C. P. 1.
(4) 15 Q. B. D. 426.
(5) Law Rep. 2 Q. B. 367.
(6) Law Rep. 2 Ex. 72.
(7) 26 Beav. 306.
(8) 4 C. P. D. 148.

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LORD ESHER, M.R. The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances. I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute. At the time when the umpire was appointed, it cannot be pretended that any dispute had arisen. The vendor and purchaser had respectively agreed to sell and to purchase the timber at a price to be fixed by valuation, and, the price not yet being fixed, there was nothing in dispute between them. If the valuers could not agree as to the price an umpire was to be appointed, but nothing need be known to the vendor and purchaser about the matter; there cannot be said to be anything in dispute between them. It was said that there was no contractual relation between the umpire and the parties. I do not see that that is necessarily so. The parties may have delegated it to the valuers appointed by them respectively to employ the umpire for them and then there would be a contract. My reason for holding that the umpire here was not an arbitrator

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is that he was, in my opinion, merely substituted for the valuers to do what they could not do, viz., fix the price of the timber. He was not to settle a dispute which had arisen, but to ascertain a matter in order to prevent disputes arising. For these reasons, I think the decision of the Court below was right.

LINDLEY, L.J. I agree. This is an application to set aside what is called an award. But the question is whether this condition of sale provided for anything more than a mere valuation, which was to be made by two valuers, or, if they could not agree, by a third valuer to be appointed by them. A valuer may be, in one sense, called an arbitrator, but not in the proper legal sense of the term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid disputes. There is nothing in the nature of a dispute when the valuer is appointed. It is a term of the agreement for sale that the timber shall be valued and that the purchaser shall take it at the valuation. It is a mere matter of fixing the price, not of settling a dispute.

LOPES, L.J. Whether an umpire is to be regarded as an arbitrator or a valuer must, in my opinion, depend on the circumstances and the documents in each case. Having regard to the circumstances and documents in the present case, I feel clear that the umpire was to be a mere valuer. I cannot see how he could be in any different position from that of the two valuers appointed by the parties respectively. He is merely substituted for them upon their being unable to fix the price. He is not called in to settle judicially any matter in controversy between the parties. No such controversy in fact existed. He is by the exercise of his knowledge and skill to make a valuation of the timber, the object being to prevent disputes from arising, not to settle them after they have arisen. For these reasons, I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Lowless & Co.*

Solicitors for respondent: *Lake, Beaumont & Lake.*

E. L.

HALL *v.* COMFORT.

1886
Oct. 28.

Practice—Mortgage — Attornment Clause — Tenancy created by Mortgage — Action by Mortgagee for Possession—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4, 6, *and* 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9, 13—*Rules of Supreme Court*, 1883, *Order III., r.* 6 (*F*), *Order XIV.*

A mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default having been made, the mortgagee commenced an action for the recovery of the premises, and applied for judgment under Order XIV.:—

Held, first, that the attornment clause was not rendered void by the Bills of Sale Acts, 1878 and 1882;

Secondly, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Order III., r. 6 (F.), and the plaintiff was entitled to judgment.

Daubuz v. *Lavington* (13 Q. B. D. 347) approved and followed.

By indenture dated the 14th of November, 1883, the defendant demised to the plaintiff by way of mortgage to secure the repayment of an advance of 650*l.* and interest, a plot of land and buildings, to hold for the residue of a term for which the defendant was tenant of the premises (except the last day of the term), provided that if the principal and interest were paid on the 14th of May, 1884, the demise should be void, and the defendant covenanted to pay on that date.

The mortgage deed contained the following provisions:

"And for the purpose of better securing the punctual payment of the interest on the said principal sum the mortgagor hereby attorns tenant to the mortgagee of the premises hereby demised at the yearly rent of 45*l.* 10*s.*, to be paid half-yearly on the 14th day of May and the 14th day of November. Provided always that the mortgagee, her executors, administrators or assigns, may at any time after the said 14th day of May next enter into and upon the said premises or any part thereof and determine the tenancy hereby created without giving to the mortgagor any notice to quit."

The defendant made default in payment, and the plaintiff commenced an action to recover possession of the premises, and applied for judgment under Order XIV.

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The Master referred the question to Grantham, J., who referred it to the Court.

Douglas Walker, for the plaintiff. The case comes within Order III., r. 6 (F.), the action being brought "against a tenant whose term has expired or has been duly determined by notice to quit," within the meaning of that rule, and the plaintiff is entitled to judgment under Order XIV.: *Daubuz* v. *Lavington.* (1)

Macaskie, for the defendant. First, the attornment clause is void under the Bills of Sale Acts. It purports to create a tenancy to which a power of distress is incident, and therefore it gives power to seize personal chattels, and comes within s. 3 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). It is a licence to take possession of personal chattels as security for a debt within the meaning of s. 4. It also comes within s. 6, by which "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." The case does not come within the proviso which follows the above clause, for there was not a demise by a mortgagee, being in possession. This document is not attested and registered, as required by s. 8 of the Act of 1882 (45 & 46 Vict. c. 43), nor is it made in accordance with the form in the schedule to that Act, as required by s. 9. It is none the less void because it would be impossible to make it in accordance with the form: *Ex parte Parsons; In re Townsend.* (2) It gives a power of immediate removal, which is contrary to s. 13. The effect is that it is void for all purposes (*Davies* v. *Rees* (3)), and therefore has not the effect of creating a tenancy, and whatever other remedies the mortgagee may have, Order III., r. 6 (F.), and Order XIV. do not apply.

(1) 13 Q. B. D. 347. (2) 16 Q. B. D. 532. (3) 17 Q. B. D. 408.

Secondly, the term has not expired or been duly determined by notice to quit within the meaning of Order III., r. 6 (F.). It is a yearly tenancy: *In re Threlfall, Ex parte Queen's Benefit Building Society* (1), explaining *Morton* v. *Woods* (2); and no notice applicable to such a tenancy has been given. This point was not taken in *Daubuz* v. *Lavington*. (3) The term has not expired, which means come to an end by lapse of time.

Thirdly, there is a defence on the merits.

Douglas Walker, in reply. Either the tenancy has been determined by notice to quit, or it was a tenancy to exist during the will of the plaintiff, and she has intimated her will that the term shall exist no longer: per Cave, J., in *Daubuz* v. *Lavington*. (4) The case is therefore within Order III., r. 6 (F.), and the Form which is applicable will be found in Appendix C, section IV., Form 13, and section VII., Form 1.

On the other points he was stopped by the Court.

LORD COLERIDGE, C.J. I am of opinion that the plaintiff is entitled to succeed. The application is for judgment under Order XIV., and it is contended that the case comes within the express words of Order III., r. 6, which includes "actions for the recovery of land . . . by a landlord against a tenant whose term has expired or has been duly determined by notice to quit." There has been no expression of opinion either by the master or by the judge, so we have now to decide the point for the first time. It is not denied that the money is due, and it is clear that there is no defence on the merits. Various objections have been made for the defendant, of which two only are material. In the first place it is said that the document is void as a bill of sale, and therefore Order XIV. cannot apply. The form of this document is a very common one. It is a mortgage, by way of demise of a long term of years less one day, and it contains a clause, by which the mortgagor attorns tenant to the mortgagee and agrees to pay rent, and also agrees that the mortgagee shall have a power of re-entry for non-payment. It is contended that because the attornment clause creates the relation of landlord and

(1) 16 Ch. D. 274.
(2) Law Rep. 4 Q. B. 293.
(3) 13 Q. B. D. 347.
(4) 13 Q. B. D. at p. 350.

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tenant, and because by reason of that relation (not by the terms of the document which is said to be a bill of sale) the landlord has power to seize any goods which may be on the premises, including in most cases other people's goods as well as the tenant's, therefore the document comes within the Bills of Sale Acts. Although the word "attornment" is used in s. 6 of the Bills of Sale Act, 1878, I cannot think that this document is fairly within the Act. It is not within the notion that one entertains of a bill of sale, because the power to seize does not apply to property scheduled, and is not confined to property now existing and in the possession of the mortgagor, but extends to any other property which may be on the premises at any time during the term, including the goods of a stranger. I cannot think that because the law attaches the right of distress to the relation of landlord and tenant that necessarily makes a document which creates such relation a bill of sale. The case is not within the mischief aimed at by the Acts. It is true that the word "attornment" is used in the Act, and it is true that under certain circumstances personal chattels may be seized in consequence of this document having been executed; but I could get no answer to the suggestion that if this were within the Acts all leases would be bills of sale. I am therefore of opinion, on the first and main point, that this is not a bill of sale within the meaning of the Acts.

Secondly, it is contended that Order XIV. does not apply, because Order III., r. 6, and Appendix C, section VII., Form 1, do not apply. I had some doubt at first whether the expression "tenant whose term has expired or has been duly determined by notice to quit" was not limited to the case of expiration by efflux of time or determination by notice in the ordinary way. I do not say that there is not some ground for that contention, but I think this is not the correct construction, and there is an express decision to that effect in *Daubuz* v. *Lavington*. (1) I think that case decided that under such circumstances as the present Order XIV. does apply. Here it was stated that notice to quit was given, but if it was not the landlady has made the tenancy expire under the contract, so that the case comes directly within the decision

(1) 13 Q. B. D. 347.

in *Daubuz* v. *Lavington*. (1) I think that decision was right. Therefore, both on principle and authority, Order XIV. applies here.

Then there is the question as to the merits. I agree that a plaintiff is not entitled to judgment ex debito justitiæ, but the Court must be satisfied that there is no defence. I am satisfied that there is none in the present case.

MANISTY, J. I am of the same opinion.

The first and main point is whether this document is a bill of sale. That turns on s. 6 of the Act of 1878, which applies to "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given." I think this implies that the power must be expressly given, and must be a special power, not the usual power of distress incident to a demise. It seems to me also that it must be a power given over some particular goods, for the section provides that such document "shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." Here there are no specific goods to which the power of distress applies, but it applies to all goods, not privileged, which may be on the premises during the demise, including those of a stranger. Then by s. 4 of the Act of 1882, "Every bill of sale shall have annexed thereto, or written thereon, a schedule containing an inventory of the personal chattels comprised in the bill of sale." It would be impossible here to have such a schedule. By s. 9 of the same Act bills of sale are void unless made in accordance with the form in the schedule to the Act, and the form assigns "the chattels and things specifically described in the schedule hereto annexed," so that the bill of sale is to have an inventory of the goods. It would be impossible to comply with this form with regard to the right of distress incident to a demise, and it would be impossible to register the deed. The result would be that all demises would be within the Bills of Sale Acts, and would be void. It seems to me that the power of distress mentioned in the Act of 1878 must be a power to seize specific goods, that the Bills of Sale Acts never contem-

(1) 13 Q. B. D. 347.

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plated the case now before the Court, and that this document did not require registration.

As to the second point, I think that but for the decision in *Daubuz* v. *Lavington* (1) it might have been possible to contend that the word "expired" in Order III., r. 6, meant at an end; but *Daubuz* v. *Lavington* (1) concludes the point.

STEPHEN, J. I am of the same opinion.

I am fully satisfied with the judgments delivered by the other members of the Court, and I only wish to say, as to the observations of my brother Manisty on s. 6 of the Act of 1878, that they are peculiarly illustrated by the circumstances of the present case. The subject of the tenancy is a pantechnicon, in which goods are warehoused. The goods which are on the premises are changed from day to day, so that it would be impossible to make an inventory of the articles subject to the power of distress, and in my opinion it is necessary to take into account the necessity to schedule the goods. I am clearly of opinion that this document is not a bill of sale. I am not satisfied that the document does not come within the proviso at the end of s. 6, for I am inclined to think that the plaintiff is a mortgagee in possession who has demised to the mortgagor within the meaning of that clause. However, it is not necessary to decide this, for I am clear that the document does not come within the first part of the section.

As to the second point I will add nothing, except that I agree with all that was said in *Daubuz* v. *Lavington* (1), and we could not question that decision here.

Judgment for the plaintiff.

Solicitors for plaintiff: *Gedge, Kirby, & Millett.*

Solicitors for defendant: *Wood, Bird, & Co.*

(1) 13 Q. B. D. 347.

P. B. H.

[IN THE COURT OF APPEAL.]

1886
Oct. 28.

THE SAILING SHIP "GARSTON" COMPANY, LIMITED *v.* HICKIE, BORMAN, & CO.

Ship—Charterparty—Excepted Perils—"Dangers and Accidents of Navigation"—Collision caused by Negligence of other Vessel—Freight, Deduction of Cost of Cargo short delivered from.

A charterparty provided that the ship should load a cargo of coal and deliver the same at the port of discharge at a freight of so much per ton on the quantity delivered (the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and navigation always excepted), the freight to be paid two-thirds in cash ten days after the vessel's sailing and the remainder in cash on the right and true delivery of the cargo agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity:—

Held, that a collision attributable solely to the negligence of those in charge of the other vessel was a "danger or accident of navigation" within the meaning of the charterparty, and therefore that the shipowners were not liable in respect of non-delivery of part of the cargo shipped caused by such a collision; but that the charterers were entitled nevertheless under the charterparty to set off the cost of the coal so undelivered against the balance of freight payable on delivery of the remainder of the cargo at the port of discharge.

Woodley v. *Michell* (11 Q. B. D. 47) distinguished.

ACTION by shipowners against the defendants as charterers and cargo owners to recover a general average contribution and a balance due in respect of freight under the charterparty. The defendants counterclaimed in respect of damage done to cargo and short delivery of cargo.

The case was tried before Grantham, J., without a jury, at the Liverpool winter assizes, when the facts appeared to be as follows. The defendants had chartered the plaintiffs' ship, the terms of the charterparty, so far as material, being these: it was thereby agreed that the ship should proceed to Cardiff or Newport as ordered, and there load a cargo of coal as specified from the charterers' factors, and should, being so loaded, forthwith proceed to Bombay and deliver the same there, "the freight to be paid on unloading and right delivery of the cargo at and after the rate of 18*s.* 6*d.* per ton on the quantity delivered (the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation always mutually excepted), the freight to be paid,

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say two-thirds in cash, less 5½ per cent. for interest and insurance, ten days after the final sailing of the vessel from her last port in Great Britain, and the remainder in cash at the exchange of 2*s.* per rupee on the right and true delivery of the cargo agreeably to bills of lading, less cost of coals or coke delivered short of bill of lading quantity."

The ship accordingly loaded a cargo of coals at Cardiff, for which bills of lading were given which followed the terms of the charterparty. She then sailed on her voyage, but, a collision occurring between her and another vessel in the canal forming the entrance to Cardiff Docks, she was so much damaged that she had to put back for repairs. It became necessary for the purpose of such repairs to unload the cargo. After the repairs had been executed the cargo was reshipped, but the result of such unloading and reshipment necessarily was a certain amount of damage and waste of the coal; and, consequently, when the cargo was delivered to the defendants on the arrival of the ship at Bombay there was a delivery short of the quantity mentioned in the bills of lading to the extent of 134 tons.

The collision was attributable solely to the negligence of those in charge of the other vessel.

The defendants refused to pay the balance of freight payable under the charterparty on delivery of the coal to them at Bombay, claiming under the provisions of the charter to set off against it the cost of the 134 tons of coal not delivered. For this balance of freight the action was brought. By their counter-claim the defendants claimed damages for non-delivery of the 134 tons of coal. The facts with regard to the claim for a general average contribution are not material to this report.

The learned judge gave judgment for the plaintiffs on the claim for a general average contribution, and for the defendants on the claim for freight, and for the plaintiffs on the counter-claim.

Against this judgment the defendants appealed, and the plaintiffs gave notice of a contention by way of cross appeal.

Carver, for the defendants. The damage to the cargo was not caused by an "excepted peril," and therefore the plaintiffs were responsible for it. In *Woodley* v. *Michell* (1) it was held that a

(1) 11 Q. B. D. 47.

collision occasioned by negligence, without any storm or unusual action of the winds or waves, was not caused by a peril of the sea. On the same principle, a loss occasioned by negligence cannot be considered to be caused by "dangers or accidents of navigation." That expression cannot be considered as equivalent to "dangers or accidents of or incidental to navigation." It must mean, applying the principle applied in *Woodley* v. *Michell* (1), something arising in respect of the navigation of the ship itself otherwise than through negligence, e.g. the accidental breaking of the rudderhead or bursting of a boiler. It cannot include something caused by the negligence of another ship. An accident is something which happens without the fault of anybody.

The defendants were entitled by the plain terms of the charterparty to deduct from the balance of freight the cost of the quantity of coal by which the delivery was short, whether the short delivery was due to an excepted peril or not. [He also cited *The Xantho* (2) and *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (3)]

French, *Q.C.*, and *Synnott*, for the plaintiffs. The expression "dangers and accidents of navigation" in the charterparty must be considered as meaning something beyond "perils of the sea." In *Woodley* v. *Michell* (1) only perils of the sea were excepted. One most obvious danger of navigation is the possibility of negligence on the part of those navigating other vessels. In *Lloyd* v. *General Iron Screw Collier Co.* (4) Bramwell, B., said: "Suppose a man were to go blindfold along the street and to run against something, could any one say he met with an accident? He would do an act that would be very likely to lead to a mischief. It is different with the person who might suffer by such an act: he might fairly say that he met with an accident, a peril which was liable to happen to any man who goes out in the road and meets with negligent people." Applying this test, a collision caused by the negligence of those in charge of the carrying ship is not an accident of navigation, but a collision caused by the negligence of the other ship is such an accident": *Hays* v. *Kennedy* (5); Story on Bailments, § 514.

(1) 11 Q. B. D. 47.
(2) 11 P. D. 170.
(3) 10 Q. B. D. 521.
(4) 33 L. J. (Ex.) 269; 3 H. & C. 284.
(5) 41 Penns. 378.

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The clause with regard to deduction from freight of cost of coal not delivered must be read subject to the clause with regard to excepted perils. The reasonable construction of the provision is that, where the shipowners are liable for the non-delivery of cargo, the charterers may deduct the amount of such liability from the freight which without such provision they could not do: *Meyer* v. *Dresser*. (1) It never could have been meant that, where the shipowners are not liable to an action in respect of the non-delivery, because caused by an excepted peril, nevertheless the charterers may deduct from the freight in respect of such non-delivery.

Carver, in reply, cited Story on Bailments, § 512 (*a*).

LORD ESHER, M.R. I will deal first with the question whether the defendants were entitled to deduct as against the balance of freight payable at Bombay on the cargo which was delivered, the cost of the quantity of cargo which was not delivered. Parties may agree, if they so please, that the cost of cargo not delivered shall be so deducted, and the only question is whether the parties here have done so. The rate of freight is stated in this charterparty in the usual place as being so much per ton on the quantity delivered. The next clause is that containing the exception of certain perils. It is said that that exception applies to the freight as coming after the clause as to rate of freight. But I should think that in every charter since such documents were in use the exception has always come in that place, but nobody till to-day has suggested that it applied to freight. The answer is that no merchant would so understand it. After the exception of perils comes the clause as to the payment of freight. It is to be paid two-thirds in cash ten days after the ship sails. To that extent it is to be prepaid and there can be no deduction for any short delivery. The remainder is to be paid on "right and true delivery of the cargo agreeably to bills of lading, less the cost of coals or coke delivered short of the bill of lading quantity." What is the natural and ordinary meaning of the words of the charterparty? It is that the balance of freight to be paid in respect of the cargo delivered is to be at the rate of 18*s*. 6*d*. per

(1) 16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289.

ton, deducting the cost of the quantity of coal not delivered. It is impossible that language should be plainer, and we must construe it according to its ordinary meaning. It may be that the cargo-owner could not recover damages in an action in respect of the short delivery, but it is plainly stated that, in paying the freight for cargo delivered, he may deduct the cost of the quantity of coal not delivered.

The remaining point is whether the defendants were entitled to recover on the counter-claim. The facts as to that point are these. The loss happened by reason of damage done to the ship by a collision with another ship, which was caused solely by the negligence of the other ship. The shipowner is primâ facie responsible for the short delivery of cargo, but the plaintiffs say that it was caused in this case by a "danger or accident of navigation" within the meaning of those words in the excepted perils clause of the charterparty. The question is whether damage, the moving cause of which was a collision through the negligence of the other ship, is caused by a danger or accident of navigation. It has been held, and I think rightly held, in *Woodley* v. *Michell* (1) that a loss caused by a collision brought about by the negligence of either vessel is not a "peril of the sea" within the meaning of that expression in an ordinary charterparty. But the charterparty here in question, like many others, contains in addition to the exception of perils of the sea the expression "all dangers or accidents of navigation." What is the true construction of that expression? Must it be construed as identical with "perils of the sea"; or must some further effect be given to those additional words? If so, the decision that such a collision is not a peril of the sea does not necessarily conclude this case. The question which the Court has to determine, having regard to its knowledge of what happens at sea, is whether a loss of which the moving and direct cause is a collision caused by the negligence of another ship is not caused by a "danger or accident of navigation" within the meaning of those words in the charter, notwithstanding that such collision has been held not to be a peril of the sea. A peril of the sea is a peril caused by some action of the elements, but what is a peril

(1) 11 Q. B. D. 47.

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Lord Esher, M.R.

of navigation? Navigation is the act of navigating ships. I will not say that a danger or accident caused by the mode in which the carrying ship is navigated would be a danger or accident of navigation. But, putting aside the case where the loss was so occasioned, one class of dangers which would most readily occur to the minds of persons accustomed to the sea would be the dangers caused by the negligent navigation of other ships. There are other dangers, but this is perhaps the principal and most obvious kind of danger which may happen at sea other than those included in the expression "perils of the sea." The navigation rules are principally intended to deal with such dangers. Is such a danger then within the words "dangers of navigation"? I should say that it most certainly is. Though not a peril of the sea it is in my opinion clearly a danger of navigation. If the loss were occasioned by the negligent navigation of the ship carrying the cargo I do not think that would be a danger of navigation within the words; that would be a loss brought about by the act or default of the shipowner's servants for which he would be liable. It would be a danger not of navigation but caused by his employing inefficient servants. I think that this appeal must be dismissed.

LINDLEY, L.J. The main question in this case is whether the collision, by which the loss was caused, and which was not attributable to any negligence on the part of those in charge of the plaintiffs' ship, comes within the perils excepted by the charter. The excepted perils are not confined to "perils of the sea," but include all "dangers and accidents of navigation." The question is, what was the object of introducing those additional words. It seems to me that they must have been intended to extend the scope of the excepted perils, so as to include perils other than perils of the sea. Any other construction gives them no meaning at all. We have, then, to consider whether a collision caused as this was can be said to be a danger or accident of navigation. I should have thought that the risk of such a collision was one of the most prominent dangers of navigation. It seems to be suggested for the defendants that the expression "danger of navigation" must be confined to matters arising in the naviga-

tion of the ship itself; but it appears to me that such a narrow construction would be quite unwarranted. I quite agree that the words would not cover dangers and accidents occasioned by the negligence of the shipowner's servants. If it be intended to except such dangers, I think it must be done expressly. I do not think such dangers can be taken to be included in general words of this kind. I cannot entertain any doubt that the judgment of the learned judge was right on this point, and it seems to me that our judgment in this respect is quite consistent with the case of *Woodley* v. *Michell.* (1)

The other point is this. The defendants seek to deduct from the total amount of the freight the cost of the quantity of coal by which the delivery was short of the bill of lading quantity. The question turns on the wording of the charterparty, which is rather peculiar. The contract is to deliver the cargo at Bombay, subject to the excepted perils: and the freight is to be paid, a certain proportion in advance, and the remainder in cash on right and true delivery of the cargo agreeably to bills of lading at Bombay, less the cost of coal or coke short delivered. This is, apparently, an express bargain that the charterers may deduct from the freight the cost of the quantity of coal not delivered. But it is said that they are not entitled to do so here, because the short delivery was caused by one of the excepted perils. I do not see how the terms of the charter can admit of that construction. It may well be that an action will not lie in respect of the short delivery, and yet that the agreement may be that the cost of the quantity not delivered shall be deducted from the freight. It seems to me that the words of the contract are too plain to admit of doubt, and that on this point also the decision of the learned judge was right.

LOPES, L.J. I entirely agree with what has been said by the Master of the Rolls and my Brother Lindley. I only desire to say a few words with regard to what is probably the most important part of the case, viz. the question whether the loss here comes within the excepted perils. In the case of *Woodley* v. *Michell* (1) the exception was of perils of the sea, and it was held

(1) 11 Q. B. D. 47.

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Lopes, L.J.

that a collision caused by negligence was not a peril of the sea. In the present case the words are much larger, and include all "dangers and accidents of navigation." The question is whether a larger interpretation is to be given to those words than to the words "perils of the sea," or whether they are to be treated as meaningless and superfluous. It seems to me obvious that they must be treated as intended to cover more than perils of the sea. That being so, I think that a collision not caused by any negligence on the part of the carrying ship is a danger of navigation. It may be asked, why should the expression "danger of navigation" cover a loss occasioned by negligence of the other ship, when the expression "peril of the sea" does not? The answer appears to me to be that the one expression properly refers to dangers caused by the elements and beyond human control, whereas navigation is a process subject to human control; and that dangers caused by the negligent navigation of other ships are therefore properly within the meaning of the term "dangers of navigation," but not within the term "perils of the sea."

Appeal dismissed.

Solicitors for the plaintiffs: *Gregory, Rowcliffes, & Co., for Hill, Dickinson, Lightbound, & Dickinson.*

Solicitors for defendants: *Trinders & Romer.*

E. L.

[IN THE COURT OF APPEAL.]

1886
Nov. 20.

THE OFFICIAL RECEIVER, AS TRUSTEE OF THE ESTATE OF H. G. IZON (A BANKRUPT) *v.* TAILBY.

Bill of Sale—After-acquired Property, Assignment of—Future Book Debts.

A bill of sale contained an assignment of (among other things) all the book debts which might during the continuance of the security become due and owing to the mortgagor :—

Held, reversing the judgment of the Queen's Bench Division, that such an assignment of future book debts, not being limited to book debts to arise in any particular business, was invalid on the ground that the subject matter was not sufficiently defined, and that it therefore did not operate to pass the property in a book debt which came into existence after the assignment.

Semble, by Lord Esher, M.R., that an assignment of future book debts to arise in the course of a particular business specified would be valid.

APPEAL from the judgment of the Queen's Bench Division reversing the judgment of the county court judge of Birmingham.

The facts, which are more fully stated in the report in the Court below (1), were briefly as follows:—

The action was for money had and received. Izon, who was declared bankrupt in 1885, had in 1879 given a bill of sale to one Tyrrell (since deceased) by way of security for the payment of money. By such bill of sale Izon, who was described therein as a packing-case manufacturer, of 87, Parade, Birmingham, assigned to Tyrrell "all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements and effects now being or which during the continuance of the security may be in, upon, or about the premises of the mortgagor situate at 87, Parade aforesaid, or any other place or places at which during the continuance of the security the mortgagor may carry on business; and also all the book debts due and owing or which may during the continuance of the security become due and owing to the said mortgagor." The executors of Tyrrell had sold under the bill of sale and assigned to the defendant certain book debts due to Izon in his business of a packing-case manufacturer. Some of the book debts so sold and assigned had come into existence after the execution of the bill of sale. The sum which the plaintiff

(1) 17 Q. B. D. 88.

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as trustee of Izon's estate sought to recover in the action was the amount of one of such subsequently accruing book debts which had been paid to the defendant by the debtor after the bankruptcy. The county court judge gave judgment for the plaintiff on the ground that the assignment of future book debts in the bill of sale was invalid and did not operate to pass such debts; but the Queen's Bench Division held such assignment valid, and entered judgment for the defendant.

Sir E. Clarke, Q.C., S.G., and *Muir McKenzie*, for the plaintiff. The assignment of future book debts is void for vagueness and uncertainty: *Holroyd* v. *Marshall* (1); *Belding* v. *Read* (2); *Leatham* v. *Amor* (3); *Lazarus* v. *Andrade* (4); *In re Count D'Epineuil* (5); *Clements* v. *Matthews*. (6) It is not limited to the book debts to arise in connection with the business carried on at 87, Parade, Birmingham, or any particular business. The terms of it would cover any debts that might become due to the mortgagor during the continuance of the security.

[LORD ESHER, M.R. "Book debts" would appear to mean debts accruing in some business, which in the ordinary course of business would be entered in a trader's books.]

Assuming that the term is so limited, it is quite clear that it is not essential to a debt's being a book debt that it should be actually entered in the books: *Shipley* v. *Marshall*. (7) Therefore the subject matter of the assignment is not defined by what subsequently comes into the books. Even if the assignment must be construed as limited to future book debts to arise in the course of the particular business before-mentioned as carried on by the mortgagor, viz. that of a packing-case maker at Birmingham, the description of the subject matter is too vague. It is not enough that, although the subject matter assigned is originally insufficiently defined, something afterwards comes into existence that answers the terms of the description. The same might have been said in all the cases, such as *Belding* v. *Read* (2), where it was held that the subject matter of the assignment was

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193.
(2) 3 H. & C. 955.
(3) 47 L. J. (Q.B.) 581.
(4) 5 C. P. D. 318.
(5) 20 Ch. D. 758.
(6) 11 Q. B. D. 808.
(7) 14 C. B. (N.S.) 566.

not sufficiently definite. The description of the subject matter must be sufficiently definite from the first. In the cases, in which an assignment of future property has been held good, the description was such that the property when it came into existence must necessarily be visibly and tangibly ascertained, as, for instance, in the case of *Holroyd* v. *Marshall* (1), where the subject matter was machinery that might be placed in a certain mill, and in the case of *Clements* v. *Matthews* (2), where the assignment was of future crops on a particular farm. There cannot be an actual assignment of future property. The question whether there is what is called an equitable assignment depends on the question whether there is an agreement to assign of which a Court of Equity could decree specific performance. It is submitted that specific performance could not be decreed where the subject matter is as vague and undefined as in this case.

Finlay, Q.C., and *Adkins*, for the defendant. The description of the subject matter of the assignment is sufficiently definite to ascertain such subject matter as and when it comes into being, and the assignment is therefore valid according to the decisions on the subject. No description of future property can be originally more definite. Till the property arises it must necessarily be uncertain what particular thing will come within the description. This case is analogous to the case of an assignment of chattels that may during the continuance of the security be brought on particular premises, which would be valid: *Holroyd* v. *Marshall*. (1) It is contended that the doctrine with regard to specific performance is that, wherever the description is sufficiently definite to ascertain the subject matter when it comes into existence, there specific performance will be decreed. Till then of course there is a mere contract and nothing of which there can be specific performance: *Collyer* v. *Isaacs*. (3) It is submitted that, having regard to the context, which relates to the stock in trade, fixtures, &c., and existing book debts of the particular business carried on by the mortgagor, the reasonable construction of the bill of sale is that the assignment of future book debts is confined to future book debts to arise in the course of that business. Even if that be not so, it is submitted that

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193. (2) 11 Q. B. D. 808.
(3) 19 Ch. D. 342.

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an assignment of all future book debts is sufficiently definite, and that a Court of Equity would decree specific performance in the case of such an assignment. An agreement to settle all future property is good: *Hardey* v. *Green.* (1) So also a company may mortgage all present and future property to debenture holders: *In re Panama, New Zealand, and Australian Royal Mail Co.* (2)

[LORD ESHER, M.R. The contention for the defendant would seem to be inconsistent with the existence of the doctrine admitted to exist in *Belding* v. *Read* (3), and all the cases of that kind with regard to a description of the subject matter which is originally indefinite.]

Assuming the description to cover all future book debts to arise during the continuance of the security, it must then cover future book debts to arise in the particular business before mentioned, and as to those it would be sufficiently definite and good though it might be bad as to any other book debts.

[LOPES, L.J. In *Clements* v. *Matthews* (4) the description was capable of being construed distributively, as it specifically mentioned future crops on particular premises as well as any future crops of the mortgagor's. Here it is not so.]

Surely the effect of saying "all book debts to become due" cannot for this purpose be different from that of saying "all book debts to become due in the said business or otherwise."

Even if equity would not decree specific performance of a contract to assign all future book debts, it is contended that the question whether an action for specific performance would lie is not the test of the validity of the assignment. The question whether a Court of Equity will decree specific performance may depend on other considerations. The only question here is whether the assignment sufficiently defines the subject matter when it comes into existence.

Muir McKenzie, for the plaintiff, was not called on to reply.

LORD ESHER, M.R. The first question which arises is what construction must be put upon this bill of sale. Is the assignment of future book debts to be read as confined to book debts arising in the particular business of a packing-case maker, which

(1) 12 Beav. 182.
(2) Law Rep. 5 Ch. 318.
(3) 3 H. & C. 955.
(4) 11 Q. B. D. 808.

is previously mentioned, as carried on at 87, Parade, Birmingham, or in that business wherever it may be carried on; or is it to be read as applying to all book debts which become due to the assignor, not only in that business but in any business wherever carried on? I think that the latter construction is the correct one, and therefore that the assignment would apply to any book debt to become due to the assignor in any business carried on by him during the continuance of the security in this or any other country. Then the next question is whether such an assignment of book debts comes within the doctrine by which certain assignments have been held to be so vague with regard to their subject matter that it was impossible that the law should give effect to them. That there is such a doctrine seems to be beyond question, for in every one of the cases in point that were cited its existence has been assumed, the only question being whether the particular description was or was not too vague. The doctrine so assumed to exist could not exist, if the argument laid before us were true, viz., that, however vague the original description of the subject matter might be, if in the end something comes into existence which comes within it, a Court of Equity would decree specific performance of the contract. In all the cases where the assignment was held void that argument might have been used. It seems to me, however, clear that the doctrine in question is well established. Then is the description in this assignment such that the subject matter is left too vague and undefined? It appears to me that it is. If it had been confined to future book debts arising in the particular business carried on at 87, Parade, Birmingham, I do not as at present advised think that it would have been too vague. If it had been confined to future book debts accruing due in that particular business wherever it might be carried on, I am disposed to think it would have been sufficiently definite. It is not necessary for the purposes of this case to decide these points, but such is the view to which I incline. It was argued that an assignment of future book debts must necessarily be too vague, but I do not assent to that argument. I apprehend that the meaning of the term "book debts" is confined to debts arising in a business in which it is the proper and usual course to keep books, and which ought to be entered in such books, though I do not think that the term is confined to

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debts which are actually entered in the books. Using the term in that sense I do not see that an assignment of future book debts is necessarily too vague; but an assignment by a man of all book debts arising in any business which he may in the future carry on in any place does seem to me to be too vague. I do not think it necessary to express any doubt as to the correctness of the decisions in any of the cases cited. In all these cases the general rule on which we are acting was allowed to exist. In some cases the description was held to be too vague, and in some not. But I see nothing in any of them at all inconsistent with what we are now holding. In the case of *Clements* v. *Matthews* (1), which came before this Court, it was held that the subject matter of the assignment was sufficiently defined by part of the description, but there was a strong intimation of opinion by two of the members of the Court that another part of the description of the subject matter would have been insufficient as to any goods coming within it. It seems to me that the decision of the Divisional Court was wrong and that the appeal must be allowed.

LINDLEY, L.J. The question is whether this assignment of the future book debts is good as against the official receiver. In the first place it is necessary to ascertain the meaning of the bill of sale. I cannot read the assignment of future book debts as confined to those which were to become due in the particular business before mentioned. It is, no doubt, intended to include any debts that might so become due, but we are asked to say that it is confined to those debts. It does not seem to me that we can so construe it. Treating it, therefore, as applying to all future book debts that may become due to the assignor during the continuance of the security, the question is whether such an assignment can be effectual. It was argued before us that the question whether specific performance would be decreed in such a case is immaterial, but it seems to me otherwise. It is impossible, in the proper sense of the term, to assign a non-existing thing either at law or in equity; but there may be an agreement to assign property when it arises, and when there is such an agreement, of which a Court of Equity would decree specific performance, there you have what is called an equitable assignment. But, apart from

(1) 11 Q. B. D. 808.

the doctrine of specific performance, I do not see how there can be any passing of after-acquired property at all. The question, therefore, in such a case as this must, as it seems to me, be determined with reference to the doctrine of specific performance. I think that it would be going far beyond any of the cases that have been decided to say that specific performance would be decreed of such a contract as this. I do not say that an assignment of future book debts must necessarily be too vague; but, where there is no limitation of them with regard to any particular business, I think the assignment is too vague.

LOPES, L.J. In my opinion it is impossible to construe the bill of sale otherwise than as applying to all book debts to become due to the assignor in any business carried on by him anywhere during the continuance of the security. The question therefore arises whether the description of the subject matter is not too wide and uncertain to admit of the assignment being considered valid. That the description may be too vague is clear from what was said in the case of *Holroyd* v. *Marshall.* (1) In *Belding* v. *Read* (2) the subject matter of assignment was held to be too indefinite, and it seems to me that that case was very like the present. The judges in the Court below rely on the case of *Clements* v. *Matthews.* (3) I think, however, that in dealing with that case they hardly sufficiently considered the effect of the judgments of the Master of the Rolls and Cotton, L.J., but must have looked too exclusively to the observations of Bowen, L.J. The majority of the Court gave effect only to a part of the description of the subject matter which they thought sufficiently specific, because they thought that the description might be read distributively. Here the words are not capable of being read distributively, and the description taken generally is too vague. For these reasons I think the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Solicitors to the Board of Trade.*

Solicitors for the defendant: *Robinson, Preston, & Stow, for Bagnall.*

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193. (2) 3 H. & C. 955.
(3) 11 Q. B. D. 808.

E. L.

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Oct. 25, 26.

[IN THE COURT OF APPEAL.]

HUGHES *v.* LITTLE.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9—*Consideration, Statement of—Form in Schedule—Bill of Sale given by way of Indemnity to a Surety—Practice—Appeal, whether final or interlocutory—Order on Appeal by Motion against the Judgment of County Court—Interpleader—Order LVIII., r.* 3; *Order LVII., r.* 13.

By a bill of sale expressed to be given in consideration of the grantee thereof having at the request of the grantor become guarantee, and signed a promissory note for the payment of a sum of 45*l.* by the grantor of which 32*l.* or thereabouts was then owing, the grantor assigned to the grantee certain chattels, described in a schedule, by way of security for any moneys which the grantee might be called upon to pay in respect of such guarantee and interest thereon at the rate of 5*l.* per cent. per annum, and the grantor agreed that he would pay to the grantee any sums as aforesaid together with interest then due by monthly payments of 2*l.* on the first of every month:—

Held, that the consideration for which the bill of sale was given was sufficiently set forth, but also (reversing the decision of the Queen's Bench Division) that the bill of sale was void by virtue of 45 & 46 Vict. c. 43, s. 9, as not being in accordance with the form in the schedule to that Act.

An order made by the Queen's Bench Division upon an appeal from the judgment of a county court on an interpleader issue affirming such judgment is a final order within Order LVIII., r. 3.

APPEAL from the order of the Queen's Bench Division dismissing an appeal by motion from the judgment of the judge of the county court of Lancaster upon an interpleader issue transferred under s. 17 of the Judicature Act, 1884.

The judgment of the county court judge was in favour of the plaintiff, who claimed under a bill of sale.

The facts are stated in the report of the case in the court below. (1)

Clay, for the plaintiff, took a preliminary objection to the appeal on the ground that the notice of appeal which had been given was bad, being a fourteen days' notice. He contended that the order made by the Queen's Bench Division upon the appeal was an interlocutory order, and therefore the notice of appeal

(1) 17 Q. B. D. 204.

ought to have been a four days' notice. He cited Order LVIII., r. 3; *Standard Discount Co.* v. *La Grange* (1); and *McAndrew* v. *Barker*. (2)

Sills, contrà, for the defendant, contended that the order of the Queen's Bench Division was a final order, because it finally determined the rights of the parties. He referred to Order LVII., r. 13, as rendering the decision in *McAndrew* v. *Barker* (2) inapplicable.

THE COURT (Lord Esher, M.R., Lindley and Lopes, L.JJ.) overruled the objection, holding that the order was a final order.

Sills, for the defendant. The bill of sale is bad, because the consideration is not sufficiently stated. The consideration is required by the Act to be "set forth," which must mean that it is to be stated with accuracy of detail. Here it is not stated exactly how much is due on the guarantee, for the statement is that 32*l.* or thereabouts is due; and it is not stated how much of that is principal and how much interest, which may be very material. Secondly, the bill of sale is void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, as required by s. 9 of that Act. The bill of sale is clearly within the section, and it is equally clear that it does not follow the form, because it does not name any definite sum to be paid, nor fix any definite time for payment. He cited *Davis* v. *Burton* (3); *Melville* v. *Stringer* (4); *Myers* v. *Elliott* (5); *Sibley* v. *Higgs*. (6)

Clay, for the plaintiff. The 9th section does not apply to all bills of sale. It is submitted that the legislature meant by that section to deal with the ordinary case of loans of money, the intention being to safeguard needy and often illiterate persons from the oppressions practised by money lenders. The form itself shews this, for it obviously deals with the ordinary case of a loan of money. A transaction such as this cannot possibly be brought within the exact terms of the form in the schedule; for it would be impossible in such a case for the bill of sale to name the exact

(1) 3 C. P. D. 67.
(2) 7 Ch. D. 701.
(3) 11 Q. B. D. 537.
(4) 13 Q. B. D. 392.
(5) 16 Q. B. D. 526.
(6) 15 Q. B. D. 619.

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sum payable; but it can hardly have been intended to prohibit such a transaction altogether.

If this bill of sale must be considered as coming within s. 9, it is contended that it is sufficient if the bill of sale complies with the substantial requirements of the form in the schedule, mutatis mutandis, having regard to the nature of the particular transaction. In the case of a loan of a definite sum of money, no doubt the exact sum must be mentioned in the bill of sale, but in a case such as this, where the sum of money can only be ascertained by subsequent events, it is sufficient if the bill of sale affords the means of ultimately defining the sum.

Oct. 26. LORD ESHER, M.R. In this case the question on an interpleader issue tried in the county court was whether a bill of sale was good. Two objections were taken to it. First, it was said that the consideration was not set forth within the meaning of the Act. It is not alleged that there was anything untrue in the statement of the consideration. Of course, if any part of the statement were contrary to the fact, the consideration would not be truly set forth within the meaning of the section. But that is not the case and therefore the objection must be that the consideration is not set forth with sufficient accuracy; that, although it is so far as it goes a true statement, it does not state the whole truth. That objection is taken on the mere form of the statement itself and not on any comparison of the form with the facts in relation to the consideration, of which we know nothing. The statement is, that the bill of sale is given in consideration of the grantee's having become guarantee and signed a promissory note for the payment of a sum of 45*l.* by the grantor, of which 32*l.* or thereabouts is now owing. It is not as if the statement were that the sum owing was 32*l.*, whereas it was really 320*l.* For aught we know, the amount actually owing was 32*l.* 5*s.* The objection therefore must be that if the amount really owing were 32*l.* 5*s.*, yet the consideration would not be set forth within the meaning of the section. I do not see why in that case the consideration would not be accurately set forth, and, therefore, it does not seem to me that there is anything to shew that this statement is not strictly accurate. But, even if there were a slight inaccuracy, so long as there is nothing untruly stated, I

think a statement would be sufficient that in substance accurately stated the consideration. I think the county court judge and the Divisional Court were right in overruling that objection.

But there is a second and more formidable objection to the bill of sale. It was given by the grantor to the grantee in consideration of the grantee having at the request of the grantor become guarantee and signed a promissory note for the payment of a sum of money by the grantor. If the grantor fails to pay this money, and the grantee is consequently called upon to pay it, the grantor is to repay the grantee the moneys so paid by him with interest by monthly instalments of 2*l.* on the first of every month. It is clear that the time, when these monthly instalments will become so payable, must depend upon the time when the grantor fails to pay the sum guaranteed to his original creditor, and the grantee is called on to pay under the guarantee. It may be that the grantee will never have to pay any sum of money at all, and if he has to pay any sum, the amount of it and the time when he will pay and when the liability to repay him will commence are uncertain. For that reason it is said that the bill of sale is not in accordance with the form in the schedule. It seems to me that, if this bill of sale is one to which the 9th section of the Bills of Sale Act (1878) Amendment Act, 1882, applies, it is impossible to say that it is not avoided by the section, because it is impossible to say that the instrument is in accordance with the form in the schedule. It appears to me that the case is really concluded by authority. Manisty, J., appears to have been of opinion that there was a distinction between this case and the cases of *Hetherington* v. *Groome* (1) decided in this Court, and *Sibley* v. *Higgs* (2) decided by Field, J., on the ground that the circumstances of this case are not exactly the same, because the amount secured by the bill of sale was in those cases payable on demand, whereas here it is to be payable by monthly instalments of 2*l.*; but a difference of circumstances does not constitute a substantial distinction between cases unless a difference in point of principle exists.

The question therefore is whether the principle upon which those two cases were decided applies to this case? In my opinion

(1) 13 Q. B. D. 789. (2) 15 Q. B. D. 619.

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it does. The ground upon which they were decided was that, as it was uncertain when the demand for payment might be made, the time for payment was uncertain, and, as the form in the schedule provided for payment of a certain sum upon a certain day, the bill of sale was not in accordance with the form. In the present case, no doubt, the sum of money secured is not made payable on demand, but the contingency upon which it is to be payable is uncertain just as in the other case. Wherever the time of payment is by any circumstances rendered uncertain, whether it be by reason of the sum secured being payable on demand, or by any other circumstance, the same principle applies. Here the time is uncertain, because the liability to pay depends on a contingency which may or may not happen, and may happen at one time or another. It appears to me therefore that the same principle which governed the previous cases applies to this case. If that be so, the case is concluded by authority, and, if it had been otherwise I should still have been of opinion that, if this bill of sale is within the 9th section, we have no alternative but to declare it void.

It is argued that the section does not apply to such a bill of sale as this, and that it applies only to cases of money lent by the grantee of the bill of sale to the grantor. But the words of the section are quite plain, and import no such restriction of its effect. The words are not "given by way of security for money lent," but "given by way of security for the payment of money by the grantor thereof." Wherever the grantor binds himself to pay money to the grantee for whatever reason and gives the bill of sale to secure that payment, the case is within the words of the section. If the grantee has at the request of the grantor undertaken to pay money for him on the terms that the grantor shall repay it to him, that transaction is as much within the plain meaning of the words as a case in which the grantee has lent money to the grantor. Whether the effect of those words may not go beyond what the legislature really contemplated it is not for us to say. If that be so, possibly it may hereafter be matter for the consideration of those whose duty it is to consider such matters whether the section requires modification: our duty is to give effect to the plain meaning of the words used. For these reasons I think that the bill of sale is within the 9th section, and

that being so it is void as not being in accordance with the form in the schedule; and therefore this appeal must be allowed, and judgment given for the appellant.

LINDLEY, L.J. I am of the same opinion. The first objection taken to the bill of sale is that the consideration is not duly set forth. That objection appears to me to be founded on a misapprehension. The consideration appears to be set forth in the statement that the bill of sale is given in consideration of the grantee's having at the grantor's request become guarantee for the payment by the grantor of a sum of money. I do not think it is any part of the consideration how much remains due of the sum so guaranteed.

The second objection is that the bill of sale is within the 9th section of the Act of 1882, and that it is void as not being in accordance with the form in the schedule to that Act. The 3rd section of the Act makes a distinction between bills of sale given by way of security for the payment of money and bills of sale given otherwise than by way of such security, and the 9th section in terms applies to bills of sale given by way of security for the payment of money by the grantor thereof. Now it is clear, in the first place, that this is a bill of sale within the meaning of the definition in s. 3. It is also clear that it is a bill of sale given by way of security for the payment of money by the grantor thereof. It is impossible to avoid the conclusion that it is exactly within the terms of s. 9.

Then comes the question whether it is in accordance with the form in the schedule. That point seems to me to have been expressly decided, and it is unnecessary for me to add anything to what has been said on the point in the judgment of this Court in *Ex parte Stanford, In re Barber*. (1) Taking the doctrine there laid down as a guide, it is impossible, I think, to say that this bill of sale is in accordance with the form. It does not name any definite sum to be paid. The grantee may have to pay the whole or some part of the sum guaranteed. It is impossible, as it seems to me, to bring the transaction intended within the form, but it does not follow, because that is so, that the 9th section does not apply if the words of it include such a bill of sale as this. If

(1) 17 Q. B. D. 259.

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the bill of sale comes within the words of the section, as appears to me to be the case here, then the instrument is void if not in accordance with the form, whether the transaction intended can be carried out in accordance with the form or not. I regret to have to come to the conclusion that this transaction, which appears to be an honest and bonâ fide one, is avoided by the Act; but, for the reasons given, I am of opinion that the appeal must be allowed.

LOPES, L.J. With regard to the first objection taken to this bill of sale, viz., that the consideration is not sufficiently stated, I entirely agree with the Master of the Rolls and my brother Lindley. The other questions that arise are, first, whether this bill of sale is within the 9th section; and, secondly, if it is, whether it is in accordance with the form given in the schedule. To be within s. 9 it must be a bill of sale given by way of security for the payment of money by the grantor thereof. It is only necessary to state the facts of this case to shew that it comes within those words. The grantor owing money to a third person, the grantee becomes surety for its payment on the terms that, if he has to pay anything in respect of his guarantee, the grantor will repay to him the amount so paid, and the bill of sale is to secure such repayment. Then is the bill of sale in accordance with the form? Clearly not. There are several cases which are authorities to shew that such a bill of sale is not in accordance with the form. It is not necessary for me to go through the cases at length. It is sufficient to say that this bill of sale does not fix a definite sum to be paid, nor a definite time at which it is to be payable. It has been said that, if this bill of sale is bad, it will be impossible to give a bill of sale by way of indemnity against liability on a guarantee. This, however, is not the first time that this Court has said that, if a transaction coming within s. 9 cannot be effected in accordance with the form in the schedule, it cannot be effected at all.

Appeal allowed.

Solicitors for plaintiffs: *Grundy, Izod, & Grundy, for Joy & Broadbent.*

Solicitors for defendant: *Dod, Longstaffe, Son, & Fenwick, for C. Heywood & Sons.*

E. L.

[IN THE COURT OF APPEAL.]

1886
Nov. 1.

THE QUEEN ON THE PROSECUTION OF THE CORPORATION OF CROYDON *v.* THE CROYDON AND NORWOOD TRAMWAYS COMPANY.

Tramway—Paving—Control of Local Authority—Difference between Company and Local Authority—Reference to Arbitration—Croydon and Norwood Tramway Act, 1883 (46 & 47 *Vict. c. clxxiv.*)—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 33.

By a local Tramway Act, passed after and incorporating the Tramways Act, 1870, the space between the rails and for a distance of eighteen inches beyond each external rail was to be paved by the company to the satisfaction of the local authority for the district with wood or other paving to be approved of by the local authority. On an application by the company the local authority declined to approve of a particular paving, and the company thereupon laid it down without such approval. On an application by the local authority for a mandamus to the company to take up the paving so laid down:—

Held (affirming the judgment of the Queen's Bench Division), that the powers given to the local authority were subject to the provisions of the Tramways Act, 1870, that a difference had arisen within s. 33 of that Act which ought to be determined by a referee appointed by the Board of Trade, and that the mandamus ought not to be granted.

THIS was an appeal from an order of the Queen's Bench Division discharging a rule for a mandamus.

The Croydon Tramways Company was incorporated by the Croydon Tramways Act, 1878 (41 & 42 Vict. c. ccxxiv.), and the company was subsequently amalgamated with the Norwood Tramways Company by the Croydon and Norwood Tramways Act, 1883 (46 & 47 Vict. c. clxxiv.).

By s. 41 of the latter Act, which is a reproduction of s. 31 of the former Act, it is enacted as follows:—

"For the protection of the mayor, aldermen, and burgesses of the borough of Croydon (hereinafter called "the Corporation"), the following provisions shall have effect and be applicable in the case of every tramway by this Act authorized, so far as the same is to be laid upon, along, or across any public street or road within the borough; that is to say,—

"2. The whole space between the rails and for a distance of eighteen inches beyond each external rail, and the whole space between the two lines where the tramway is double, shall be paved

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by the company to the satisfaction of the council with wood or other paving, to be approved of by the council, and shall at all times be kept in good repair by the company."

Sect. 2 of the Act incorporates Parts II. and III. of the Tramways Act, 1870, so far as the same are applicable to and not varied or excepted by or inconsistent with the provisions of this Act.

By arrangement between the tramway company and the local board of health for the district of Croydon (before the incorporation of the borough) some parts of the line of rails of the tramway were laid with granite macadam on either side and in the spaces between two lines. The company, alleging that this was dangerous, applied to the corporation for permission to lay down granite setts, which was refused. The company thereupon executed the work without having obtained the approval of the council. The corporation applied for and obtained a rule nisi for a mandamus commanding the company to take up the granite setts in the specified places and to relay the same with macadam, or other paving to be approved by the corporation. On argument this rule was discharged by a Divisional Court (Lord Coleridge, C.J., and Fry, L.J.) on the ground that the corporation had not exercised their discretion in considering the application made to them; and further, that a difference had arisen within the meaning of the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33, which should be settled by a referee nominated by the Board of Trade. (1)

The corporation appealed.

Sir R. Webster, *A.G.*, and *Murphy*, *Q.C.* (with them *R. G. Glenn*), in support of the appeal. The true interpretation of

(1) Sect. 33 of the Tramways Act, 1870, enacts: "If any difference arises between the promoters or lessees on the one hand and any local authority .... on the other hand, with respect to any interference or control exercised, or claimed to be exercised by them .... in relation to any tramway or work .... or with respect to the propriety of or mode of execution of any work relating to any tramway .... or on the question whether any work is such as ought reasonably to satisfy the local authority .... or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade, on the application of either party ...."

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s. 41 of the special Act is that the company have power to lay down wood, but they can use no other paving without the approval of the corporation. The exercise of discretion in this matter is not controlled by the 33rd section of the Tramways Act, 1870, which was passed previously to the local Act. If the two Acts are inconsistent, the express power given to the corporation must prevail over the general power of control by the Board of Trade contained in the general Act.

Sir H. Davey, Q.C. (with him *Pembroke Stephens, Q.C.*, and *G. S. Bower*), for the company. This is a question of repairing and not of construction, but even if it were otherwise, the corporation are exercising a control as to the mode of execution of work relating to the tramway. The company contend that the work ought reasonably to satisfy the local authority, and that the case is within the express words of s. 33 of the Tramways Act, 1870. The proper course is to apply to the Board of Trade to appoint a referee, and the remedy by mandamus is not available.

LORD ESHER, M.R. As to the first point which was argued, I should like to say that I cannot agree with the suggestion that the corporation of Croydon have declined to exercise their judgment upon the question. I see no evidence to support that view. On the second point argued I have a strong opinion. I take the judgment of the Divisional Court to be this—taking the facts stated on the affidavits to be uncontradicted, that although the local authority have brought their minds to bear in arriving at a decision, there is evidence that that decision was not a reasonable conclusion to come to. Then the question must be whether, there being a matter to be considered, the Act of Parliament has not said that, at all events to that extent, the proper tribunal to determine that point is, not the Divisional Court acting by mandamus, but the Board of Trade. That depends on the true construction of s. 33 of the General Act when read with s. 41 of the special Act.

Now is there anything inconsistent in the view that the question of whether the local authority has acted reasonably or not is to be referred to the Board of Trade, with what are called the absolute terms of the 41st section of the private Act. I cannot

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see myself that however absolute an authority may be in terms in the first instance, it is inconsistent to say that if that authority is exercised unreasonably the question of unreasonableness may be decided by a superior tribunal. This would leave to the local authority absolute power upon the terms of their exercising that absolute power reasonably. This restriction contained in the 33rd section is not upon a particular local authority, it applies to them all; and when you consider what a number of local authorities there must be in the kingdom, with regard to these tramway roads at the present time, I should have expected that the Act of Parliament would put a bridle upon them to that extent at all events. However despotic their authority may be in the first instance they must exercise it reasonably, and reasonably according to the decision of the superior tribunal or the superior authority. That is the sort of supervision that in many instances is given to the Board of Trade. Therefore expecting to find that power of supervision given to the Board of Trade, I look to the 33rd section, and I cannot help thinking that to give or refuse assent to certain proposed acts is, and must be, exercising control at all events; that the exercise of that control is within the 33rd section, and that it must be seen whether that control or authority has been exercised reasonably or not. I think, therefore, there was a question to go to the referee of the Board of Trade as to whether the corporation had exercised their control reasonably or unreasonably, and until that was decided no such mandamus as was asked for could be granted. This appeal will, therefore, be dismissed.

LINDLEY, L.J. I am of the same opinion. I think that it is impossible to say that the corporation did not exercise "control" over the construction of these rails, or over the substances or materials which were to be used in order to keep the rails in place. They had a right to disapprove of any material suggested by the tramway company, except possibly wood. I say except possibly wood, because I am not quite sure about the construction of the section as to that. If I prohibit a man from doing a thing, I control him to that extent. If once you arrive at that, it seems to me that the 33rd section makes this case plainly one

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in which it is proper to refer the dispute to the Board of Trade, and therefore I think the view taken by the Divisional Court was right on that point.

LOPES, L.J. I think the difference which has arisen in this case is a difference which is expressly contemplated by the words in s. 33 of the Tramways Act, 1870, "or on the question whether any work is such as ought reasonably to satisfy the local authority." It appears to me that those words were introduced for the purpose of meeting a case such as this. They were introduced for the purpose of preventing any unreasonable or despotic action on the part of the local authority.

I think the decision of the Court below was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitor for prosecution: *George Tilling.*
Solicitors for defendants: *Sutton & Ommanney.*

A. M.

[IN THE COURT OF APPEAL.]

Nov. 5.

DIXON *v.* FARRER, SECRETARY OF THE BOARD OF TRADE.

Crown, Prerogative of—Right to Trial at Bar—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *s.* 10—*Detention of Ship for Survey—Action against Board of Trade—Interest of Crown—Change of Venue—Crown Suits Act*, 1865 (28 & 29 *Vict. c.* 104), *s.* 46.

By the Crown Suits Act, 1865, s. 46, where in any cause in which the Attorney General is entitled on behalf of the Crown to demand as of right a trial at bar, he states to the Court that he waives that right, "the Court on the application of the Attorney General shall change the venue to any county he may select":—

Held (affirming the judgment of the Queen's Bench Division), that an action under s. 10 of the Merchant Shipping Act, 1876, against the Secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the Attorney General is entitled to demand as of right a trial at bar in such an action, and that the Court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried.

THIS was an appeal by the plaintiff from a judgment of the Queen's Bench Division, reported 17 Q. B. D. 658.

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The action was by a shipowner against the Secretary of the Board of Trade under the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 10, to recover compensation for the loss sustained by the plaintiff by reason of the detention of his ship without reasonable and probable cause. (1) The ship was detained for survey while in harbour at North Shields, under the powers given to the Board of Trade by s. 6 of the Act. The plaintiff having laid the venue at Newcastle, the Attorney General, on behalf of the Crown, moved the Divisional Court to change it to London, and after cause had been shewn against the rule, it was made absolute.

The plaintiff appealed.

Sir W. Phillimore, and *J. P. Aspinall*, for the plaintiff. The Attorney General is not entitled as of right to a trial at bar, and therefore s. 46 of the Crown Suits Act, 1865, does not entitle him to claim a change of venue. (2) It is admitted that the Statute of Westminster the Second did not bind the Crown, and that actions to which the Crown was a party could not be sent down for trial under a writ of nisi prius without the consent of the King's attorney. But if the Crown was not a party, its right to a trial at bar was confined to those cases in which it was actually and immediately interested: 2 Inst. 424; Fitzherbert, de Naturâ Brevium, 241. In *Rowe* v. *Brenton* (3) it was held that, as the revenues of the Crown were affected, it was entitled as of right to forbid the issue of a writ of nisi prius. In *Brown* v. *Lord Granville* (4) the trial at bar was allowed as of right, because the rights of the Crown, as Duke of Lancaster, were affected. In *Paddock* v. *Forester* (5) it

(1) The action appears to have been commenced against the Secretary to the Board of Trade by name, instead of under his official title.

(2) Sect. 46 of the Crown Suits Act, 1865, enacts: "Where a cause in which Her Majesty's Attorney General on behalf of the Crown is entitled to demand as of right a trial at bar, is at any time depending in any of Her Majesty's superior Courts of law at Westminster, whether instituted before or instituted after the commencement of this Act, and the Attorney General states to the Court that he waives his right to a trial at bar, the following provisions shall have effect: (1) the Court on the application of the Attorney General shall change the venue to any county in which the Attorney General elects to have the cause tried. . ."

(3) 3 M. & R. 133; 8 B. & C. 737.

(4) 1 Harrison & Wollaston, 270.

(5) 8 Dowl. 834; 1 M. & G. 583.

is plain from the record that the land on which the trespass was committed was Crown property. It is not sufficient that the King's officer should be affected by the action, and in *Lord Bellamont's Case* (1), and *Buron* v. *Denman* (2), the apparent ground for granting a trial at bar was that the Crown would have paid the damages in the action out of its private revenues, and was thus immediately affected. In cases where the Crown was not immediately concerned a trial at bar was granted as a matter of discretion, and not of right: 2 Tidd's Practice, p. 748. In the present case a special remedy having been provided by statute by way of an action against the Secretary to the Board of Trade, there is no reason for resorting to procedure applicable to cases where the Crown itself is interested.

Whatever may have formerly been the case, the Judicature Acts and Rules have taken away the right to a trial at bar. By s. 6 of the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), the power to make rules of Court was extended to all proceedings by or against the Crown. At that time trial at bar had impliedly been abolished by Order XXXVI., r. 2, of the Rules of 1875; and the effect of Order XXXVI., rr. 6, 9, of the Rules of 1883 (3), is to substitute for it a trial by two or more judges with a jury at nisi prius.

[They also cited *Dimes* v. *Lord Cottenham* (4), *Attorney General* v. *Constable* (5), and *Attorney General to the Prince of Wales* v. *Crossman.* (6)]

Sir C. Russell, Q.C., and *R. S. Wright* (with them *Sir R. Webster, A.G.*), in support of the rule. No rules have been made under s. 6 of the Statute Law Revision and Civil Procedure Act, 1881, and Order XXXVI. of the Rules of 1883 deals with nisi prius actions and does not affect trials at bar. There is nothing in those Rules shewing that the Crown is to be bound; and Order LXXII., r. 2, under which, where no other provision is made by the Acts or Rules, the then existing procedure and practice remained in force, shews that the argument that Order

(1) 2 Salk. 625.

(2) 2 Ex. 167.

(3) Order XXXVI., r. 9: "Every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges."

(4) 5 Ex. 311.

(5) 4 Ex. D. 172.

(6) Law Rep. 1 Ex. 381.

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XXXVI. swept away all but the modes of trial indicated in it is incorrect. In the Crown Suits Act, 1865, the right of the Crown to a trial at bar is recognised.

The true principle to be derived from the cases is, that the Court will accept, in the first instance, the statement of the Attorney General that the Crown is interested in a case; but that a party to the action may be heard to shew that there has been a misconception on this point. This appears from *Paddock* v. *Forester* (1), *Rowe* v. *Brenton* (2), and other cases.

[LOPES, L.J., referred to the special report of *Rowe* v. *Brenton* by Concanen.]

The damages in this case, if any, would not be paid by the nominal defendant but out of public moneys, and all public moneys are granted by votes to the Crown. It is not necessary, however, to shew any such interest in the Crown, for it has been the uniform practice, going back for a very long period, for the Crown, by its legal advisers, to defend its executive officers. This is illustrated by *Lord Bellamont's Case* (3) and *Buron* v. *Denman*. (4)

Sir W. Phillimore, in reply.

LORD ESHER, M.R. In this case an action was brought against the Secretary to the Board of Trade under s. 10 of the Merchant Shipping Act, 1876, which gives a right of action to a shipowner when his ship is detained under the Act, if the detention is without reasonable and probable cause.

The statute gave the right to the Board of Trade to detain a ship to see whether she can safely go to sea, and if she cannot, to forbid her going to sea, either absolutely or until certain things are done, but, in order to protect shipowners, the statute gave a right of action against the Secretary to the Board of Trade in his official capacity, if there was not reasonable or probable cause for the detention. That is the allegation here, and the plaintiff commenced an action and laid his venue at Newcastle. Thereupon the Attorney General came before a Divisional Court and stated that the Crown was interested in this matter and that he

(1) 8 Dowl. 834; 1 M. & G. 583.
(2) 3 M. & R. 133; 8 B. & C. 737.
(3) 2 Salk. 625.
(4) 2 Ex. 167.

appeared for the Crown and was instructed by the Crown to defend. Under the Crown Suits Act, 1865, s. 46, where a cause in which the Attorney General is entitled to demand as of right a trial at bar is depending in any of the superior courts at Westminster, and the Attorney General states to the Court that he waives that right, the Court, on his application, are to change the venue to any county in which the Attorney General elects to have the cause tried. The question, therefore, is whether, under the circumstances of this case, the Attorney General could claim the right to have a trial at bar.

It was suggested at one time that if the Attorney General stated that the Crown was interested, the Court was bound to make the rule absolute in the first instance, and that such order could not afterwards be questioned. It was afterwards, however, suggested that though the statement of the Attorney General is accepted in the first instance, a party to the action could come before the Court, and the burden of proof being upon him, if he could shew that the Attorney General had been misinformed and had misinformed the Court, as to the Crown being interested, the Court would set aside the rule absolute which it had made; and I think that is the true state of the case.

Looking at the report of *Rowe* v. *Brenton* in Concanen's report of that case, the first decision, as I understand it, was that upon the mere statement of the Attorney General coming ex officio before the Court, that the Crown was interested, although the cause was apparently between private individuals, the Court made the rule absolute for a trial at bar. Then Mr. Brougham endeavoured to set aside that rule on the ground that the Crown was not interested, and he certainly was admitted to be heard on that question. It turned out that upon his own affidavits it appeared that the Crown was interested, though not directly, and thereupon the rule absolute was maintained. That case of itself would not shew that the Court can set aside the rule absolute, because as the affidavits shewed that there was an interest in the Crown, it was not necessary to determine the point, but in *Paddock* v. *Forester* (1) we have the authority of Tindal, C.J., that the Attorney General had a right to demand on the part of the

(1) 8 Dowl. 834; 1 M. & G. 583.

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Crown a trial at bar, but he added that it was "for the plaintiff to shew the Court that it is misinformed upon the case if that is the fact." I think that is an authority for the proposition that the Attorney General is entitled to a rule in the first instance upon his statement that the Crown is interested, but that it is open to the party who objects to that order to shew that, in point of fact, the Court is misinformed on this point, and unless he can shew this the rule would stand.

That leaves open the question in what cases the Crown is interested. It is obvious that if the property of the Crown, either in the personal capacity of the Sovereign or in the Sovereign's capacity as head of the State, is to be touched by the decision in the case the Crown is interested; but can the Crown be interested although neither the personal property of the Sovereign nor the property of the Sovereign as head of the State is affected? On one side it is urged that the Crown cannot be interested unless one of those two things is made out, and on the other side it is said that the Crown is interested if an executive officer of the Government acting for the executive, and therefore for the Sovereign, is charged with maladministration in his official capacity, that is, as servant of the Crown.

Lord Bellamont's Case (1) seems to be clear on the point. The report is short, and thereupon a number of suggestions were made about what might have been the charge made, but any one who considers the case can, it seems to me, have no doubt that the defendant was charged with having done something which was an abuse of his office as governor of a part of the King's dominions. If that action had been successful against him he would have been bound to pay the damages recovered out of his own property, and they could not possibly have been enforced against the Crown. Therefore neither the personal property of the Sovereign nor the Sovereign's property as head of the State would have been affected by the decision. Nevertheless the claim of the Attorney General, who stated that he was instructed by the Crown to defend the case on behalf of the Crown, was admitted, clearly on the ground that the Crown was interested in seeing that the duties of its servants were properly discharged,

(1) 2 Salk. 625.

and that there was thus a sufficient interest to enable the Crown to intervene in the cause. Then there is the case of *Buron* v. *Denman*. (1) Many suggestions were made to account for the intervention of the Attorney-General, but on looking not merely at the legal report but at the concurrent newspaper reports, it is clear to my mind beyond a doubt that although the property of the Crown was not affected it was held that the Crown had an interest in the cause. The defendant, being an officer in the navy, had assumed to act in the matter out of which the action arose as a servant of the Crown, and the Crown was interested in the question whether he had misbehaved or not. Those cases seem to me an absolute authority on this branch of the case.

This action is against the defendant in his official capacity as representing one of the great departments of the State for an executive act done by that department under an Act of Parliament. The case is therefore within the rule, and there was sufficient interest in the Crown and a right in the Attorney General to intervene on behalf of the Crown unless that right is taken away by the Judicature Acts. These Acts have put an end to the three Courts at Westminster as distinguished from one another, and have introduced Divisional Courts as parts of the High Court. What was formerly done by the Courts in banc is now done by Divisional Courts. A trial at bar was a trial before a Court in banc, and if for such a Court there is substituted a Divisional Court it seems to follow that a trial at bar would now be a trial before a Divisional Court. If that is so what is there to take away the privilege of the Crown to ask for a trial at bar? I can see nothing that touches it. Under Order XXXVI., r. 9, the order would be made by a Divisional Court precisely as it would formerly have been made by a Court in banc. Even in an action between two subjects, and if the prerogative of the Crown did not come in question, I cannot see that upon proper materials the order might not be made that the trial should be at bar. That is not the same thing to my mind as an order under Order XXXVI., r. 9, that a trial of a question with a jury should be before two or more judges. If then the Attorney General has a right to ask for a trial at bar, and he waives that right, he has

(1) 2 Ex. 167.

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by the express terms of the Crown Suits Act, 1865, the right to the change of venue he has asked for. The order of the Divisional Court was rightly made, and as the plaintiff has failed to shew that the Crown was not interested the order must stand and the appeal will be dismissed.

LINDLEY, L.J. I am of the same opinion. The right of the Attorney General to ask for a change of venue is based upon s. 46 of the Crown Suits Act, 1865, and the first question which we have to consider is whether the present is a cause in which Her Majesty's Attorney-General on behalf of the Crown is entitled to demand as of right a trial at bar. It was suggested that inasmuch as the Crown had no interest whatever in any such cause as this in the year 1865, such an action as this not being possible until 1876, this case was not within the Crown Suits Act, 1865. But the words "the Crown is entitled to demand as of right" do not mean, as I understand, where the Crown had at the time of the passing of the Act an interest, but where the cause when it arises is of such a character as will entitle the Crown to demand as of right a trial at bar.

Then the next question which I will allude to is the point that trials at bar are things of the past. There is nothing either in the Judicature Acts, or in the Rules which have been made under them, which deprives either the Crown or anybody else of the right to have a trial at bar. It is to be got at, if at all, by spelling out the Rules, and when that is done it appears to me that trials at bar are not abolished, but are preserved. If the right to have them is not abolished, either by the Acts or the Rules, it would be very strange to say that the right had disappeared, the object of the Rules being merely to deal with machinery and procedure. Now let us look and see what the difficulty is. Supposing that the Court is asked to make an order for a trial at bar, what is there in the Rules to prevent it? So far as I can discover there is absolutely nothing to prevent it, but there is something which warrants it, and that is the preservation by Order LXXII., r. 2, of the old practice where the Rules do not apply. There might have been a difficulty under the rules which regulate trials, because they say that the trial

of any fact or question at issue shall be before one judge, which is contrary to a trial at bar. To meet that, the qualification at the end of Order XXXVI., r. 9, is inserted "unless such trial be specially ordered to be by two or more judges." Now, combining the operation of the two rules, I do not see the slightest difficulty in holding that trials at bar are not abolished by the Judicature Acts and Rules, and can take place under them. I quite agree that under the last words of Order XXXVI., r. 9, you may have now what there was a difficulty in having before—a trial before one or two judges, but you may also have a trial at bar before the Divisional Court, which, as the Master of the Rolls has pointed out, has taken the place of the Courts of Queen's Bench, Common Pleas, and Exchequer.

The next question is the substantial one, whether this is a case in which the Attorney General would have the right to a trial at bar? That depends upon whether the Crown is interested or not, and the discussion as to that branched off in two directions. First of all we have to consider whether it is sufficient for the Attorney General to come and say that the Crown is interested, whether that can be in any way contradicted, or whether the Court is bound to accept that statement and refuse to look into evidence to the contrary. Now the practice upon that has been explained and can be gathered from the two cases of *Rowe* v. *Brenton* (1) and *Paddock* v. *Forester* (2), and, as I understand it, is, that the Court gives credence to the statement of the Attorney General, subject to this, that it is competent to his opponent to shew that he is misinformed. If the Court should, on the materials before it, come to the conclusion that the Attorney General is misinformed, he has no such right to ask for a trial at bar, and the rule absolute will be set aside. That seems to me to be the result of the cases. Here there is no affidavit, but it is put for the appellant upon this, that the nature of the case is such, and the form of the action is such as to shew that the Crown is not interested. That depends upon what is meant by "interested."

Now the facts are simply these, that here is a nominal defendant sued as representing one of the departments of the State,

(1) 3 M. & R. 133; 8 B. & C. 737. (2) 8 Dowl. 834; 1 M. & G. 583.

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and it is agreed on all hands, that if a verdict goes against him, and damages are got against him, the money to satisfy the verdict must be got from Parliament, and that that money must be granted to the Crown. It appears to me that the case is free from difficulty as far as that point is concerned, and that it is much simpler in truth than either the case of *Lord Bellamont* (1) or *Buron* v. *Denman* (2), in which the Crown claimed the right to have a trial at bar, on the ground that it was defending an officer of State for what was alleged to have been misconduct. This is a case in which it is easier to come to the conclusion that the Crown is interested, and has a right to interfere, and defend the action, and to have a trial at bar, or, in modern practice to change the venue.

It appears to me for these reasons the appeal ought to be dismissed.

LOPES, L.J. In this case the Attorney General, stating that the Crown was interested in the litigation, and waiving a trial at bar, claims, under the provisions of the Crown Suits Act, 1865, that the Court shall change the venue from Newcastle to London, the latter place being the place where the Attorney General elects to have the cause tried. Now, if the Crown is entitled to demand, as of right, a trial at bar, it is perfectly clear that the Attorney General by the terms of the 46th section of the Crown Suits Act, 1865, is entitled to what he asks in this case.

Two questions arise, the first is, is the Attorney General entitled to demand as of right a trial at bar in this case, on the ground that the Crown is interested in the litigation. The second question is, is he entitled to what he asks on the mere statement that the Crown is interested, without going into evidence.

With regard to the first point, it appears to me that it is only necessary to state two matters in order to come to the conclusion that the Crown is interested. Beyond all doubt, the defendant in this case is a high responsible officer of a department of the Government; beyond all question the damages which the plaintiff can and may recover in this action must come out of money voted to the Crown by Parliament. It appears to me that

(1) 2 Salk. 625. (2) 2 Ex. 167.

directly those two matters are established, it is impossible to say that the Crown is not interested. But it was said that the Crown can only be interested so as to entitle it to intervene when property of the Crown is interfered with. There are two cases which I think clearly establish that that contention cannot be maintained, *Lord Bellamont's Case* (1) and *Buron* v. *Denman*. (2) It must be observed, that in both those cases, a rule absolute was obtained in the first instance upon the statement of the Attorney General, and that to my mind makes it perfectly clear that the Attorney General obtained a trial at bar because the Crown was interested. The procedure would not have been such as it was, unless that had been the case. And it may be observed with regard to this privilege which is claimed by the Crown in a case like this, that it is not altogether unreasonable. As I have already stated, the defendant is a responsible officer of a department of the Government, and it would be highly inconvenient if such a responsible officer, and the functionaries connected with that department, might be taken away to any part of the country. It is much more convenient and better that this privilege should exist, and that the cases should be tried where most convenient for that responsible officer of a department of the State.

With regard to the other point, which is, that the Attorney General is entitled when the litigation is between subjects to a trial at bar on his bare statement. There was some difficulty in determining what the practice with regard to this matter had been; but it appears now, from the cases that have been cited to the Court, that the Attorney General, on stating that the Crown is interested, is entitled on that mere statement to a rule absolute, but that it is open to the other parties to move to discharge that rule, if they can make out that the statement of the Attorney General is groundless. That that is the practice of the Courts is established by *Paddock* v. *Forester* (3) and *Rowe* v. *Brenton*. (4)

It was further contended that the effect of the Judicature Acts and Rules was to abolish trials at bar, and counsel relied upon Order XXXVI., r. 9. I do not think that it was intended that that rule should have any reference to trials at bar. I think that trials

(1) 2 Salk. 625.
(2) 2 Ex. 167
(3) 8 Dowl. 834; 1 M. & G. 583.
(4) 3 M. & R. 133; 8 B. & C. 737.

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at bar remain where they were; but, in my opinion, under that rule, power is given to the court to authorize trials with juries before two or more judges anywhere as distinguished from that which used to be a special incident of a trial at bar, namely a trial at Westminster.

For these reasons I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitor for defendant: *The Solicitor to the Board of Trade.*

A. M.

Nov. 9.

[IN THE COURT OF APPEAL.]

FIRBANK'S EXECUTORS *v.* HUMPHREYS AND OTHERS.

Principal and Agent—Warranty of Authority—Company—Directors—Over Issue of Debenture Stock—Measure of Damages.

The plaintiff contracted to make a railway, and did work for which he was entitled to be paid cash. The company not being in a position to pay, an agreement was made during the progress of the works by which the plaintiff agreed to accept debenture stock in lieu of cash. The defendants, who were directors of the company, thereupon issued to the plaintiff certificates for the agreed amount of debenture stock, such certificates being signed by two of the defendants. At that time, although the fact was not known to the defendants, all the debenture stock which the company were entitled to issue had been issued, and consequently that which the plaintiff received was an over issue and valueless. The company subsequently went into liquidation, but valid debenture stock retained its par value. In an action to make the defendants personally liable for the amount of the debenture stock which should have been issued to the plaintiff under the agreement:—

Held, that the defendants were liable on their implied representation that they had authority to issue valid debenture stock which would be a good security, and that under the circumstances the damages were the nominal amount of the stock which the plaintiff ought to have received under his agreement.

APPEAL from the judgment of Mathew, J., on the trial of the cause without a jury.

The action was brought by Joseph Firbank to recover damages from the five defendants, who were directors of the Charnwood Forest Railway Company, on the ground that they had represented and warranted to him that two certificates for debenture

stock of the company were good and valid certificates, and were issued under the borrowing powers of the company and not in excess thereof, and that they had as directors authority to issue the certificates to the plaintiff on behalf of the company, whereas the certificates were not good or valid, but were issued in excess of the borrowing powers of the company, and the defendants had no authority to issue them.

At the trial it appeared that Firbank, who was a contractor, entered into an agreement with the company to construct the line of railway, and under that agreement he was to receive cash payment on the certificates of the engineer of the company. In order to provide for these payments the company made an agreement with one Maddison, under which he was to place the shares and stock of the company and to pay the contractor out of the money so obtained. Maddison having failed to pay money due to Firbank on the engineer's certificates, Firbank pressed for payment, and a fresh agreement was made between him and the company. The evidence as to how that agreement came to be entered into, and on some other points, was conflicting, but the learned judge at the trial came to the conclusion that one term of the agreement was that in lieu of cash payments due to him Firbank should have issued to him debenture stock of the company. Pursuant to this agreement, at a meeting of directors on the 26th of July, 1882, the defendants issued to Firbank certificates for 18,400*l.* debenture stock of the company, such certificates being signed, under authority given them for that purpose, by two of the defendants, Humphreys and Warner. It turned out ultimately that at the time when these certificates were given the whole of the debenture stock which the company were entitled to issue had been issued, but of this the defendants were not aware, the facts having been misrepresented to them by the secretary of the company. The company at a subsequent period went into liquidation, and it was stated that there were no assets, but that valid debenture stock had always been worth twenty shillings in the pound. The learned judge held that all the directors were liable to Firbank on their representation that they were empowered to issue this debenture stock; and, further, that the damages which could be recovered were the value of the deben-

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ture stock. He therefore gave judgment for the plaintiff for 18,400*l.* The defendants appealed, but before the appeal came on for hearing Firbank died, and his executors were substituted as plaintiffs.

Rigby, Q.C. (with him *R. S. Wright* and *H. H. Asquith*), for the defendant Mowbray, and *Sir Horace Davey, Q.C.* (with him *Cohen, Q.C.* and *W. Graham*), for the defendants Humphreys and Warren, were heard in support of the appeal. There can be no warranty that these were valid debentures, for there was no contract between Firbank and the defendants. The contract was with the company, and the debentures was issued to carry out that contract and not for the purpose of entering into any new contract to which the directors should be parties. If the plaintiffs rely on a representation that the company had power to issue the debentures they must shew that Firbank was induced to change his position by reason of the representation, and that the principal, that is the company, is not bound. But the company are liable on the contract made with Firbank, and as they have failed to give him valid debentures he is entitled to sue for his debt. He has not repudiated his contract, which included many other matters, but is seeking to segregate this term of it. To make the defendants liable under these circumstances would be to extend the principle of *Collen* v. *Wright* (1) far beyond any of the recorded cases.

In *Weeks* v. *Propert* (2), *Chapleo* v. *Brunswick Building Society* (3), and *Dickson* v. *Reuter's Telegram Co.* (4), no contracts existed, as in this case, binding on the principal. Assuming, however, that the defendants are liable, they cannot be charged as sureties, but only on their representation that they had authority to issue debenture stock. The measure of damages is the extent to which Firbank was prejudiced, and as all the debenture stock authorized had been issued the contract by the company to issue a further amount was worthless, consequently no damage has arisen from the non-performance of that contract, and the damages in the present case are nominal.

(1) 7 E. & B. 301; 8 E. & B. 647.
(2) Law Rep. 8 C. P. 427.
(3) 6 Q. B. D. 696.
(4) 3 C. P. D. 1.

H. D. Green, Q.C., and *Macaskie*, appeared for the defendant Stretton, and *Douglas Walker*, for the defendant Bruton.

Sir R. Webster, A.G., and *Finlay, Q.C.* (with them *H. Sutton*), for the plaintiffs. The debenture stock was issued by all the defendants, and for the company. There was an implied warranty that the debenture stock so issued was a good and binding security. Had that representation been true Firbank would have received a good security to the extent of the nominal value of the stock, whereas if the plaintiffs are thrown back on the contract they can only sue a company which is in liquidation and has no assets. The only way the defendants can escape their liability is by shewing that no loss has arisen, because the claim against the company can be successfully enforced, which it cannot be, or by shewing that there was no consideration for the contract. As to this Firbank was entitled to cash, and agreed to accept debenture stock, and that would be good consideration whether the work had been done or was to be done. Under these circumstances it is submitted that the judgment appealed against was right.

Rigby, Q.C., in reply.

Cur. adv. vult.

1886. Nov. 9. LORD ESHER, M.R. In this case there is a certain complication in the facts but no difficulty as to the law when once the facts are ascertained. The plaintiff in the action was a railway contractor, and entered into a contract with the Charnwood Forest Railway Company to make the railway. Under that contract he was to be paid in cash as the work went on on the certificates of the engineer. The railway company had no money of its own, and in order to carry out their scheme and fulfil their contract with Firbank they entered into a financial arangement with Maddison, which it is not necessary minutely to consider, by which he undertook to place with the public certain debenture stock and shares which the company had power to issue. He was in fact to finance the company, and as part of the agreement he arranged that he would pay Firbank on the certificates. He entered into no agreement with Firbank, but his agreement was with the company, for whom he was agent.

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The work proceeded and certificates were given, and Maddison obtained money by placing debenture stock or otherwise, and paid Firbank on some of these certificates, but after a time he failed to do so, and I think there cannot be a doubt that in conjunction with the secretary he acted dishonestly by the company. He placed debenture stock and received the proceeds, and instead of keeping his contract with the company he and the secretary must have disposed between them of the greater part of the funds so obtained. His not paying Firbank was no failure of duty to or of contract with him, but a breach of the contract with the company. Firbank was by his agreement entitled to be paid cash by the company for the work done, and if they could not get it through Maddison they were as between themselves and Firbank bound to get it otherwise.

I cannot say, without looking more minutely into the contract, whether Firbank could have thrown it up, or whether he would have been bound to continue to do the work. However that may be, it became necessary as a matter of business that a new arrangement should be made between Firbank and the company. [His Lordship then dealt with the dispute as to the facts, and continued:—] The matter stands, then, that Firbank was to have debenture stock issued to him in payment of his past claim, and was to go on with the works on the terms of the new agreement. I now come to the meeting of the 26th of July. All the directors were present at the meeting on that day, and it would be absurd to suppose that they did not know of the difficulties of the company, and that Firbank had not been paid. It is in evidence that the agreement was explained to all the directors present—what agreement? Not only that for continuing the work in future, for that would not by itself have set them free from their difficulty, but the whole agreement. Under these circumstances we are all of opinion that each of the directors had the matter explained and knew what was being done. What was done? The agreement was, that if Firbank would go on with the work he should be paid in a certain manner, but it was also part of the agreement that if he would accept debenture stock in lieu of his right to cash the company would issue debenture stock to him. None of the directors knew that this would be an

over issue of debenture stock, and the plan they adopted was the easiest way of getting rid of their difficulties. If they agreed to that arrangement that would be an agreement between Firbank and the company by which the company would be bound. There was then a binding contract with the company that he would accept debentures for the debt already due, and if they were issued go on with the work. If nothing had occurred but a breach of that agreement I apprehend that the directors would not have been liable. The arrangement of course was that valid debenture stock should be issued, and they must have known that they would have to issue it on behalf of the company. Under these circumstances what was done? At the meeting of the 26th of July the agreement was produced and explained, and the certificates for the debenture stock were also produced at that meeting, and were signed by two of the defendants. It seems to me that the defendants by agreeing that two of their number should sign the certificates authorized this issue as much as if every one of them had signed and handed over the certificates. They, therefore, issued them, and whether they were handed over that day or two days later is immaterial, whenever it was done it was by and for the directors. They did not know, but the truth was, that the certificates could not bind the company and were worthless to Firbank, because the powers of the company in this direction had already been exhausted, and this was an over issue. Under these circumstances had Firbank any right to recover personally from the defendants? On the one side, it is said that according to the rule in *Collen* v. *Wright* (1) Firbank had a right to sue the directors. The way in which it is put is, that the directors were agents of the company and had authority to issue debenture stock binding on the company, provided the powers of issuing such stock had not been exhausted; but they had no authority to make any over issue so as to bind the company. By issuing these certificates it is said that it must be implied that they had affirmed that they had authority to issue them, and that Firbank accepted them, relying on that affirmation of authority, and as by reason of want of authority he has been damaged, the defendants have made themselves personally liable within the rule

(1) 7 E. & B. 301; 8 E. & B. 647.

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laid down in *Collen* v. *Wright* (1). On the other hand, it is said that cannot be so, because this debenture stock was issued in fulfilment of a contract which was binding on the company, whereas in that case the contract which the agent professed to enter into on behalf of his principal was invalid as against the principal. I think the language used in *Weeks* v. *Propert* (2) and *Dixon* v. *Reuter's Telegram Co.* (3) shews that the principle of *Collen* v. *Wright* (4) extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

That being the rule, I am of opinion that all these defendants by issuing this debenture stock asserted to Firbank that they had authority to bind the company by that issue, and whether that was in fulfilment of a binding or invalid contract is immaterial. The question then arises for what damages they are liable. I do not say that in all such cases they would be liable for the nominal amount of the stock—for instance, if the company had been solvent there was nothing to prevent Firbank suing for the debt due to him and recovering from the company. He might have been put to some expense by the postponement of his cash payments and by having to sue the company, and I am not by any means clear that the damages in such a case in an action against the directors would have been merely nominal. The damages, under the general rule, are arrived at by considering the difference in the position he would have been in had the representation been true, and the position he is actually in, in consequence of its being untrue. If the assertion had been true he would have had valid debenture stock which would have been a first charge on the property of the company, and, as I understand, that would have been a good security. If he is postponed

(1) 7 E. & B. 301; 8 E. & B. 647.
(2) Law Rep. 8 C. P. 427.
(3) 3 C. P. D. 1.
(4) 7 E. & B. 301; 8 E. & B. 647.

or thrown back on his right of action against the company, the company is in such a position that he will get nothing. Therefore, in the present case the damages are the difference between what the debenture stock would have been worth to him, and what he can get from the company on his claim, which is nothing, and therefore the damages are the full amount of the debenture stock, and the judgment for that amount must be affirmed.

LINDLEY, L.J. The position of affairs on the 26th of July, 1882, may be thus shortly stated. The company was indebted to its contractor for work done, and could not pay those sums in cash, nor could it pay in cash for the work remaining to be done. Under these circumstances, and with a view to induce the contractor to abstain from pressing for cash, and also to induce him to continue the works, the company agreed to give him 18,400*l.* debenture stock and security for the balance due under the original contract for making the line. Pursuant to this agreement the directors of the company gave him certificates for 18,400*l.* debenture stock, and thereupon the contractor forbore to press the company for cash, and he proceeded to finish the line. The company was afterwards wound up, and it was then discovered that when the above agreement was made and the certificates were given the company had already issued the whole of the debenture stock which the company could then lawfully issue; whence it follows that the company could not then legally issue more, and that the certificates given by the directors for the 18,400*l.* debenture stock were valueless. It further appears that the company cannot pay its unsecured creditors anything; but its debenture stock is and always was worth 20*s.* in the pound. Under these circumstances the contractor claims to make the directors personally responsible for the value which the 18,400*l.* debenture stock purported to be given him would have had if it had been validly issued. The learned judge who tried the case has decided in favour of the contractor, and has assessed the damages at 18,400*l.*, and the contractor is content with this sum. Whether the contractor is entitled to recover this amount from the directors depends upon two questions, viz.:—1. Whether the directors are to be treated as having impliedly warranted

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that they, as agents of the company, had authority to issue 18,400*l.* debenture stock? 2. What is the measure of damages for which they are liable if they are to be so treated?

The first question must in my opinion be answered in the contractor's favour. He could not know whether the company had or had not already issued the full amount of debenture stock which it was authorized to issue. He was justified in assuming that the directors had power to do what they did; and by giving him the debenture stock certificates they in truth represented to him that they had such power. Moreover, they in effect requested him not to insist on payment in cash, and to go on with the works in consideration of receiving debenture stock. These circumstances bring the case directly within *Collen* v. *Wright* (1) and that class of cases. There is the representation by the directors to the contractor and consideration given by him in the shape of action by him on the faith of such representation. Nothing more is necessary to make the principle laid down in *Collen* v. *Wright* (1) applicable to the case. The fact that the directors were themselves deceived and did not know or suspect that they had not the power to do what they did is immaterial in cases of this description. Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes. The present case is within this exception, and the directors are liable to the contractor for the misrepresentation they made to him.

The next question is as to the amount of damages to which the contractor is entitled. The directors cannot be treated as having warranted the solvency of the company, and if genuine debenture stock of the company had been worthless, the measure of damages would have been nil, but in this case the company's debenture stock is and always has been worth twenty shillings in the pound. Consequently the value of 18,400*l.* genuine debenture stock is the measure of the contractor's loss. That is what he agreed to

(1) 7 E. & B. 301; 8 E. & B. 647.

take in satisfaction of a larger demand, and that is what he has lost by reason of the misrepresentation made to him. This was the view taken by Mr. Justice Mathew. I think it correct. The appeal is dismissed with costs.

LOPES, L.J. I agree with the judgments that have been given and I have nothing to add.

Appeal dismissed.

Solicitors for plaintiffs: *G. H. K. & G. A. Fisher.*

Solicitors for defendants: *Stretton, Hilliard, Dale, & Newman; Kingsford, Dorman, & Co. for Smith & Mammatt, Ashby-de-la-Zouch, and Fisher, Jesson, & Wilkins, Ashby-de-la-Zouch; Field, Roscoe, & Co. for Deane & Hands, Loughborough.*

A. M.

[IN THE COURT OF APPEAL.]

Oct. 30.

NOTTEBOHN & CO., AND OTHERS *v.* RICHTER AND OTHERS

Ship—Charterparty—Cargo to be loaded from Shore at Ship's Risk—Loss after delivery and before loading—Excepted Perils—Limitation of Liability of Shipowner.

By a charterparty a vessel was to proceed to a port, and there to load a cargo from the shore by the ship's boats and crew at ship's risk and expense. A part of the cargo was lost, after delivery from the shore and before it was loaded on board, through one of the perils enumerated in the exceptions in the charterparty. In an action by the charterer for the non-delivery of this part of the cargo:—

Held, that the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, and that consequently the exceptions applied, and the shipowner was not liable for the non-delivery.

THIS was an appeal by the plaintiffs from the judgment of Grantham, J., at the trial of the cause without a jury at Liverpool.

The action was by the charterers of the ship *Belle Flower*, belonging to the defendants, for not delivering forty-six logs of mahogany in accordance with the charterparty. By the charterparty the ship, then on her way to Barbadoes, was to proceed to Fecolutla, and load there, and take on board a cargo of mahogany;

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"the cargo to be taken from the bank of the river inside the bar or river shore afloat by the ship's boats and crew at ship's risk and expense." The vessel after loading was to proceed to Queenstown or Falmouth for orders, and thence to a safe port in the United Kingdom or on the continent between Havre and Hamburg, or as near thereto as she might safely get, "the act of God, restraints of rulers and princes, fire, and all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever always excepted," and deliver the cargo at the freight and in manner named. The ship accordingly sailed for Fecolutla, and the mahogany was delivered at the river bank and taken by the ship's boats to the vessel. Before it could be loaded forty-six logs were lost. It was admitted that the loss was by reason of perils which were excepted in the charterparty, and the learned judge held that the expression "at ship's risk" brought the goods on delivery within the charterparty, so that the exceptions applied, and he gave judgment for the defendants.

The plaintiffs appealed.

Bigham, Q.C., and *Joseph Walton*, for the plaintiffs. The expression "at ship's risk" means at the absolute risk of the ship, just as at owner's, at charterer's, or at any other person's risk would mean absolute risk. If the question had arisen who was to insure from the shore to the ship, the answer would have been the shipowner. The goods were entirely under his control, and he took the risk into consideration in making the contract. The contention on the other side gives no effect to these words, for if the voyage commenced when the goods were taken from the bank they would be subject to the terms of the charterparty, and the ordinary liability of the shipowner would attach subject to the charterparty. The words were inserted to make that liability absolute and independent of the charterparty.

Cohen, Q.C. and *Pickford*, for the defendants. The meaning of "at ship's risk" is that the same risk is to attach as if the goods were on board, and consequently the exceptions in the charterparty apply directly the goods are delivered to the shipowner. Without these words the shipowner would only be liable for negligence as bailee, and the words enlarge his liability.

They cited *Bruce* v. *Nicolopulo* (1), *Barker* v. *M'Andrew* (2), and *Hudson* v. *Hill.* (3)

LORD ESHER, M.R. This is a charterparty under which the ship is to sail from Barbadoes to Fecolutla, there to take a cargo on board and carry it to the United Kingdom. That is one voyage, and that is the chartered voyage, and whatever part of the charterparty applies to the voyage applies to the whole of it. The exceptions in the charterparty, so far as they can be applied, apply to the whole chartered voyage. The duty of the shipowner is to proceed to the place where the goods are, and to be ready to take them on board. If he is prevented from taking them on board by one of the excepted perils, he is excused from delivery. If this charterparty had been in the ordinary form it would have been the duty of the charterer to bring his goods alongside so as to deliver them into the ship. The provisions of the charterparty would not be applicable to these goods during the transit from the shore to the ship, because they are not at that time brought within the purview of the charterparty. If it were not for this exceptional clause the shipowner would have nothing to do with the goods during transit from the shore to the ship. Supposing that without such a clause the shipowner, not being under any obligation to carry from the shore to the ship, were to agree with the charterer that he would do so. That would be an independent contract and would certainly not bring the goods within the charterparty. In the present case it is put into the charterparty that the shipowner will do it, but he does not undertake that he will take the goods at all risks, but at ship's risks. To my mind, it is clear that this means that he will take them at the same risk as the ship would be liable to when the goods were on board. The expression "at ship's risk" cannot be strictly correct, because the ship has no risk, but I cannot doubt that the meaning is that the shipowner will take the goods and, when once they are in his possession, treat them as to risks as if they were on board the ship. I think that view is supported by what was evidently in the mind of Willes, J., in

(1) 11 Ex. 129; 24 L. J. (Ex.) 321. (2) 18 C. B. (N.S.) 759; 34 L. J. (C.P.) 191. (3) 43 L. J. (C.P.) 273.

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Barker v. *M'Andrew* (1), with regard to the word "guaranteed," which occurred in the charterparty in the expression "guaranteed for cargo in all this month," which he construed to mean not an absolute guarantee but a guarantee subject to the shipowner not being prevented by the excepted perils. I think, therefore, the decision of Grantham, J., was right, and this appeal must be dismissed.

LINDLEY, L.J. I have come to the same opinion. It is obvious that this charterparty cannot be strictly construed. It differs in some respects from the usual form where the excepted perils follow after and apply as much to delivery as they do to the voyage. Here they are inserted in the charterparty between the clause as to the voyage to the United Kingdom and the obligation to deliver. So, again, according to strict literal construction the excepted perils would only be applicable after loading. But we must not look only to the grammatical construction, and the proper way to treat the matter is that the exceptions apply to all the risks which the shipowner takes. The words in the special clause bring the goods while in transit from the shore to the ship within the charterparty, and so the exceptions apply during that transit. The dilemma put does not exist, for the answer is that if the words "at ship's risk" were not in the charterparty, the transit would not be under the charterparty at all.

LOPES, L.J. I am of the same opinion. I think the reason suggested by Mr. Cohen for the introduction of these words is correct, and does away with the suggestion that unless the risk is an absolute one the words are without meaning. The true position of the shipowner is that he agrees that he will treat the charterparty, with its exceptions, as applying from the time when the goods are loaded from the shore.

Appeal dismissed.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson, Bright, & Warr, Liverpool.*

Solicitors for defendants: *Gregory, Rowcliffes, & Co., for Hill, Dickinson, Lightbound, & Dickinson, Liverpool.*

(1) 18 C. B. (N.S.) 759; 34 L. J. (C.P.) 191.

A. M.

Applied. BRITISH MOTOR TRADE ASSOCN. *v.* GILBERT. [1951] 2 All E.R. 641.

[IN THE COURT OF APPEAL.]

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Nov. 25.

RODOCANACHI, SONS & CO. *v.* MILBURN BROTHERS.

Ship—Charterparty—Bill of Lading differing from Terms of Charterparty—Measure of Damages—Circumstances peculiar to Plaintiff—Advanced Freight "subject to insurance."

The plaintiffs chartered the defendants' ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom. The charterparty provided that the master was to sign bill of lading at any rate of freight and as customary at port of lading without prejudice to the stipulation of the charterparty. There was also a cesser of liability clause. A cargo was shipped under the charterparty at Alexandria by and on account of the charterers, and a bill of lading was given containing an exception, which was not in the charterparty, protecting the shipowners from liability for damage arising from any act, neglect, or default of the pilot, master, or mariners. The cargo was lost by the negligence of the master. In an action for non-delivery of the cargo, the jury found that there was no special custom at Alexandria with regard to the form of bill of lading in use there:—

Held, that, whether such finding were right or wrong, the terms of the charterparty did not authorize the giving of a bill of lading containing the before-mentioned exception: and that, even if they did, in the absence of express provision to the contrary, as between the shipowners and the charterers only the charterparty could be regarded as constituting the contract, and the bill of lading must be looked on as a mere receipt for the goods: and consequently that the defendants were liable for non-delivery of the cargo.

The plaintiffs having sold the cargo "to arrive," at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived:

Held, that in estimating the damages such market value must be looked to, and not the price at which the plaintiffs had sold the cargo.

The charterparty provided that sufficient cash for ship's disbursements should be advanced, if required, to the captain by the charterers on account of freight, subject to insurance only.

The plaintiffs having advanced sums for ship's disbursements on account of freight as provided for in the charterparty:

Held, that, in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well.

APPEAL of the defendants from the judgment of Manisty, J., reported 17 Q. B. D. 316, and contention by the plaintiffs by way of cross appeal.

The action was upon a charterparty by the plaintiffs, as charterers and cargo-owners, against the defendants, as ship-

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owners, for the non-delivery of a cargo of cotton seed shipped under the charterparty upon the defendants' ship. The 10th clause of the charterparty was as follows: "The master to sign bill of lading at any rate of freight, and as customary at port of lading, without prejudice to the stipulation of this charterparty, receiving the difference, if less than the rates specified therein, at port of loading, against his receipt for the same." It was also provided that the charterers' liability was to cease when the cargo was shipped, provided it was worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for all freight, dead freight, and demurrage: and that sufficient cash for ship's disbursements should be advanced, if required, to the captain by the charterers, on account of freight, at current rates of exchange, subject to insurance only. The port of lading was Alexandria, and the cargo was to be delivered at a port in the United Kingdom. The cargo having been shipped, a bill of lading was signed by the master containing an exception, which was not in the charterparty, protecting the shipowners from liability for any damage arising "from any act, neglect, or default whatsoever of the pilot, master, or mariners."

The cargo shipped was lost by the negligence of the master of the ship.

Evidence was given at the trial with regard to the form of bill of lading in use at Alexandria. There was also evidence given on behalf of the plaintiffs to the effect that on the signing of the bill of lading a discussion had taken place as to its divergence from the terms of the charterparty, and that the captain and ship's agents had said that the bills of lading were only receipts for the cargo taken on board, and did not in any way affect the clauses of the charterparty.

The learned judge asked the jury the following questions:—

1. Was it the custom at Alexandria to insert in all bills of lading a clause exempting the ship from liability for loss occasioned by the negligence of the master and crew?

2. Was the bill of lading in this case signed in the form in which it is upon the understanding that it was to be treated only as a receipt for the cargo and in no way to affect the clauses in the charterparty?

The jury answered as follows: It appears to have been usual to sign bills of lading with a clause which exempted the owners in a greater or less degree, but there was no special custom in Alexandria: and they answered the second question in the affirmative.

After the execution of the charterparty and before the shipment of the cargo the plaintiffs had sold the cargo "to arrive" at a price less than the market price at the port of discharge at the time when the ship in the ordinary course should have arrived there. The plaintiffs had made advances under the charterparty on account of freight for ship's disbursements at the port of loading, retaining, however, out of such advances the amount necessary for premiums of insurance thereon.

The learned judge entered judgment for the plaintiffs on the ground that the terms of the bill of lading did not control the contract contained in the charterparty: and, the question of damages being left to him, he held that the plaintiffs were entitled to the price at which they had sold the cargo less the amount which ought to be deducted in respect of freight: and that such amount ought to be the total amount of the charter freight, including, therefore, the amount of the freight advanced, on the ground that the meaning of the charter was that the shipowners were to allow to the charterers a sum equal to the premium payable on the insurance of the advanced freight, and, if the plaintiffs had not chosen to insure, nevertheless they could not recover this amount from the defendants.

Bigham, Q.C., and *Manisty*, for the defendants. Upon the findings of the jury the judgment should have been entered for the defendants. The effect of the first finding is that the terms of the bill of lading were in substance the usual terms of bills of lading at Alexandria. The words "without prejudice to the stipulation of the charterparty" refer to the rate of freight only. The charterparty must be construed, reading the 10th clause and the cesser of liability clause together, as meaning that the bills of lading were to be signed in the form customary at Alexandria, although it might contain stipulations in addition to and so far modifying those of the charterparty; and so by anticipation it

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incorporates into the contract between the charterers and the shipowners the terms of such bills of lading. Thus looked at the bill of lading is not contrary to the charterparty. The decisions to the effect that, when the charterparty and the bill of lading differ, the charterparty is to govern, and the bill of lading is to be looked on as a mere receipt, were in cases where the charterparty did not provide for fresh terms in the bill of lading: *Gledstanes* v. *Allen* (1); *Wagstaffe* v. *Anderson* (2); *Sewell* v. *Burdick*. (3) If the finding of the jury does not amount to finding that there was a custom at Alexandria that the bill of lading should contain this exception, the jury upon the evidence ought to have so found, and their verdict is against the evidence. The second finding of the jury is immaterial, because the effect of the bill of lading and charterparty must depend on the documents themselves, not on contemporaneous verbal discussions at the time of signing the bill of lading. Whatever the meaning of the charterparty, the charterers having allowed their goods to be carried under this bill of lading are bound by its terms.

With regard to the damages the plaintiffs are not entitled to be placed in a better position than they would have been in if the contract had been fulfilled. It is contended on the authority of *The Paraná* (4) that the measure of damages for non-delivery of goods carried by sea is the cost of the goods to the plaintiffs plus interest thereon from the time of the outlay; but at any rate it cannot be more than the price the plaintiffs were to get for the goods. A long sea voyage differs in this respect from a railway journey. The ordinary rule as to damages in the latter case assumes that the goods will not be sold before arrival, and that they can be sold immediately on arrival. When those assumptions cannot be made the ordinary rule is inapplicable, and no other test is available than the cost of the goods plus interest.

[LOPES, L.J. *The Parana* (4) was a case of delay in delivery not of non-delivery.]

It must be admitted that, if the goods had been sold "to arrive" for a price exceeding the market value, in estimating the damages

(1) 12 C. B. 202.
(2) 5 C. P. D. 171, 177.
(3) 10 App. Cas. 74, 105.
(4) 1 P. D. 452; 2 P. D. 118.

the price at which the goods had been sold could not be taken into account. The same considerations, however, do not apply to the two cases. It is often the case that the plaintiff cannot recover the full actual loss which he suffers when that depends on circumstances peculiar to himself; but it is submitted that he ought never to obtain more than he would have obtained if the contract had not been broken.

Thirdly, the advanced freight was rightly deducted in arriving at the damages. By the terms of the charterparty the shipowners were to allow the charterers the amount necessary to insure the advanced freight, and the premium was actually retained out of the advance, and it is contended that by the contract the plaintiffs were to take the risk in respect of the sum so advanced. Whether the plaintiffs actually insured it or not is immaterial. It must be assumed that they have. They are therefore not entitled to recover this amount from the defendants; they cannot recover it twice over.

[LORD ESHER, M.R. It does not follow that the underwriters they insure with will turn out solvent.]

The way in which it must be put for the plaintiffs is that the goods were enhanced in value to the extent of the advanced freight; that when the goods were lost they were worth in addition to their cost the amount of such advance. But that is a fallacy. The goods may be considered enhanced in value to the extent of the freight when they arrive, but not when they are lost. The goods at the bottom of the sea are not enhanced in value: *Winter* v. *Haldimand.* (1) They also cited *Gray* v. *Carr.* (2)

Finlay, Q.C., and *Gorell Barnes*, for the plaintiffs. The charterers were not bound to take this bill of lading under the charterparty. If they had not taken it the terms of the charter would remain in force. The jury have found that they only took it as a receipt for the goods. If they had been asked to take it on any other terms they would have refused. Secondly, the evidence of any custom at Alexandria with regard to the form of the bill of lading entirely failed. Thirdly, the words "without prejudice to the stipulation of the charterparty," reasonably

(1) 2 B. & Ad. 649. (2) Law Rep. 6 Q. B. 522.

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construed, mean without prejudice to the contract contained in the charterparty. If that expression is to be read as pointing only to the rate of freight, then it is contended that the whole clause is confined to the question of freight, and means only that bills of lading may be signed at a different rate of freight from that mentioned in the charter without prejudice to the right to freight under the charter. The expression "as customary at the port of lading" refers only to the mode of signature of the bill of lading. For instance, sometimes the bill of lading is signed by the master, sometimes by the ship's agents. Sometimes it is the practice of the port to sign for goods brought alongside before they are loaded. Upon the true construction of the charterparty the defendants' contention fails. But, assuming that the charterparty did provide for the signature of such a bill of lading as this, it is contended that the authorities clearly shew that as between the charterer and the shipowner the charterparty governs the contract, the bill of lading being a mere receipt for the goods: *Sewell* v. *Burdick*. (1)

With regard to the damages, the true measure of damages is the market value of the goods when and where they should have been delivered, apart from any circumstances peculiar to the plaintiff: *Great Western Ry. Co.* v. *Redmayne*. (2) In the case of damages on a contract for the sale of goods, it is clear law that in estimating the value of the goods the price obtained on a sub-sale cannot be considered.

With regard to the advanced freight, the question is, what is to be deducted from the market value. It cannot be that freight which has already been paid is to be deducted. In respect of that sum which was paid, and could not be recovered, it made no difference to the plaintiffs whether the ship arrived or not. Suppose the whole freight had been paid in advance. When the ship arrived, the plaintiffs would have had nothing to pay to get their goods, and therefore the measure of damages would have been the market value without deduction. If the freight were deducted the plaintiffs would pay it twice over.

Bigham, Q.C., did not reply.

(1) 10 App. Cas. 105. (2) Law Rep. 1 C. P. 329.

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LORD ESHER, M.R. In this case the plaintiffs had chartered the defendants' ship, and by the terms of the charterparty the captain was to sign a bill of lading for the cargo, which he accordingly did. The terms of the charterparty and those of the bill of lading are not identical, there being no exception in the charterparty of liability for loss occasioned by the act, neglect, or default of the master or mariners, whereas there is such an exception in the bill of lading. The plaintiffs contend that they are entitled to sue on the charterparty, and to rely on the contract therein expressed; and therefore that they are entitled to recover notwithstanding the exception in the bill of lading. The defendants admit that, if the charterparty had stood alone, they could not have disputed their liability; but they say that the charterparty contained clauses by which "the master was to sign bill of lading at any rate of freight and as customary at port of lading," and by which the liability of the charterers was to cease when the goods were shipped. Reading those clauses together they say that the proper conclusion is that the liability, which they, as the shipowners, would have incurred under the charterparty, if it had stood alone, has been altered by the bill of lading which the plaintiffs must be taken to have presented for signature, and which was accordingly signed, and that the new liability is governed by the bill of lading. These being the contentions, the judge left to the jury the question whether it was the custom at Alexandria, the port of lading, to insert clauses in bills of lading exempting the shipowners from liability for losses occasioned by the negligence of the master. In answer to a question asked by the jury the judge said in effect that a custom must be so nearly universal that any exception to it would be very rare and special, meaning, as I understand him, that it must be so far universal that any business man dealing in the particular place would know of it; so that he defined what he meant by custom in the question. He asked them whether there was such a custom in the case of all bills of lading. They answered that it appeared to be usual to sign bills of lading with clauses exempting shipowners in greater or less degree, but that there was no special custom at Alexandria. I should say that the answer negatived the existence of any custom, in the sense of universal custom, at

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Alexandria as to the form of bill of lading in any case, and that it entirely negatived the existence of any customary form of bill of lading with regard to cases where there was a charterparty. If they meant to find that, though there was no universal custom, still there was a usual form, then I think that such finding would be contrary to the evidence. I think that the jury were perfectly justified in finding that there was no custom in the strict sense of the term, and, if they meant to say that there was a usual form, it seems to me that the evidence clearly shewed that there was no such form. It shewed, on the contrary, that there was constant variation in the forms of bills of lading used at Alexandria, for no two of the forms of bills of lading adduced in evidence as examples were alike. It was urged that each form has a provision in various terms which would absolve the shipowner from loss occasioned by his servant's negligence. But I think that there cannot be considered to be a customary form of bill of lading where all the forms put forward differ in almost every respect except in containing such a provision. It is like saying that two men are alike because each one has one foot alike. What, then, is the meaning of the charterparty? It provides that the master is to sign "bill of lading" (which it is admitted by the defendants' counsel must, as a matter of business, mean bills of lading, if more than one bill of lading is required in respect of different portions of the cargo), "at any rate of freight and as customary at port of lading." It is difficult to say what the meaning of the words "as customary at port of lading" may be. The port of lading being Alexandria, and given the fact that there is no customary or usual form of bill of lading in use there, it is impossible to suppose that those who entered into this charterparty meant that the bill of lading was to be in the form customary at the port of lading. It would appear that the words refer to the signature of the bill of lading, and that they mean that it is to be signed in the manner customary at the port of lading. For instance, it might be that at the particular port it was customary to sign bills of lading for goods brought alongside before they were actually shipped. I cannot say exactly what the words may refer to, but they would be satisfied by referring them to such a practice as this. I read

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the words as referring to the mode of signing. But, assuming that the words may mean more than that, still they must be read with the following words, "without prejudice to the stipulation of the charterparty," for these words appear to form part of the same provision. Construing these latter words in a business manner, and bearing in mind that the parties had in the previous part of the same clause used "bill of lading" in the singular as including the plural, I think it is clear that the words are really equivalent to "without prejudice to the charterparty." It seems to me that, in either of the views I have been expressing, the case is really covered by the authorities, which expressly hold that as between the charterers and the shipowners the bill of lading does not alter the contract between them contained in the charterparty. But, assuming that under this clause of the charterparty the master was to sign bills of lading in the form customary at the port of lading, and that the form of this bill of lading was such customary form, so that only a bill of lading in this form could be signed in accordance with the charterparty, then the result would be that the bill of lading to be signed under the charterparty would be one the stipulations of which were in part not the same as those of the charterparty. What in that case is the rule as to the construction of the two documents? In my opinion even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods. With regard to the effect of these documents as between charterers and shipowners, I adopt fully what was said by Lord Bramwell in *Sewell* v. *Burdick*. (1) This doctrine gives effect to both instruments, because, although as between the shipowners and the charterers the bill of lading is only a receipt for the goods, it will be the contract upon which the holder of the bill of lading to whom it is indorsed must rely as between himself and the shipowner. Therefore, to sum up what I have said; if the construction I have put on the words "without prejudice to the stipulation of the charter" is correct,

(1) 10 App. Cas. 105.

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cadit quæstio. If that is not correct and the construction is that the bill of lading to be signed may be different in its terms from the charterparty, then it can only be so if the form of bill of lading is the customary form at the port of lading, but here there was no such customary form at the port of lading. Thirdly, assuming that this was the only form of bill of lading that could be signed consistently with the charterparty, then there being nothing in either document to shew that the terms of the bill of lading were to be in substitution for the charterparty contract, that is still the contract between the shipowners and the charterers, and the bill of lading is to be treated as only a receipt for the goods. It appears to me that the second question which the learned judge left to the jury was not really necessary, and that without the answer to that question the result would be the same, but if it were otherwise, then I think the answer of the jury was quite right having regard to the particular circumstances of this case, and that answer also would dispose of the case.

These considerations determine the question of liability, but then there is the question as to the amount of the damages. I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? If the goods are delivered he obtains them, but in order to obtain them he must pay the freight in respect of which there is a lien on them. If there were no lien, he would be entitled to the goods without paying anything. Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is

to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for sale of the goods. That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages. But the plaintiff would not get the market value clear, and therefore to arrive at the loss a plaintiff in such a case as this has sustained, it is also necessary to consider what he would have to pay in order to get the goods, viz., the freight for which there was a lien. He would get the goods, but in order to do so he must pay the accruing freight. Therefore the damages are the market value of the goods, when they ought to have arrived, minus the accruing freight. With regard to the third point as to the prepaid freight; that is paid and cannot be recovered; it is immaterial with regard to it whether the goods arrive or not; so that in respect of that the plaintiffs' position is just the same, whether the goods are delivered or not. In estimating the difference of his position in the two events, therefore, the prepaid freight is not to be taken into account. On these grounds I think that the defendants' appeal fails, and the plaintiffs' cross appeal must be allowed.

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LINDLEY, L.J. I am of the same opinion. The first question is, what is the contract which regulates the rights of the parties. It seems to me that the charterparty must be the governing instrument. The meaning of the 10th clause of it is not altogether easy to ascertain. It is difficult to say exactly what is meant by the words "as customary at the port of lading." I doubt whether they mean anything more than "as usual." I am clearly of opinion that they do not mean that the captain is to have authority to sign bills of lading containing stipulations contradicting the provisions of the charterparty. It seems to me, however, that all difficulty is removed by the finding of the jury, that there was no custom as to the form of bill of lading at the port of lading. Because, even if the words did mean that a bill of lading was to be signed in the customary form, although it contradicted the terms of the charterparty, it turns out that there is no such customary form. It was argued that, reading the cesser of liability clause and the 10th clause of the charterparty together, an intention was shewn that a new and different contract from the charterparty should be created as between the plaintiffs and defendants by the bill of lading. I cannot say that I see on the documents any trace of such intention. The authorities shew that primâ facie, and in the absence of express provision to the contrary, the bill of lading as between the charterers and the shipowners is to be looked upon as a mere receipt for the goods. There is nothing here to shew any intention to the contrary; so far from there having been in fact any animus contrahendi when the bill of lading was signed, the jury have found upon the evidence that there was none, and that the bill of lading was taken as a mere receipt. The next question is as to the damages. It must be remembered that the rules as to damages can in the nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries. The rule in an action such as this seems to be well settled, viz., that the damages are the value of the goods at the port of discharge, minus the accruing freight, and that any contract for sale of the goods made by the charterers, whether at a greater or less price than the market value, is not to be taken into account. It is

admitted that a contract for sale at a larger price could not be taken into account; but it is contended that nevertheless one made at a less price should be. I cannot see any reason for this. Then, with regard to the question as to advanced freight, so soon as the facts are understood, all difficulty seems to be cleared away. The measure of damages is the market value at the port of discharge, less what the charterers must have paid to get their goods. The advanced freight cannot be recovered back, and is no part of any sum which the plaintiffs would have had to pay to get their goods. It seems to me, therefore, that the defendants' appeal fails, and the plaintiffs' cross appeal succeeds on both points.

LOPES, L.J. The main question in this case is whether the charterparty or the bill of lading is to govern the liability of the defendants. There is an exception in the latter which is not contained in the former, the bill of lading exempting the shipowners from loss occasioned by the negligence of their servants. It is urged that the charterparty must be read as incorporating the terms of the bill of lading; and the defendants rely on a supposed custom at Alexandria to insert such an exception in the bill of lading, though not contained in the charterparty. According to my construction of the charterparty, no such contention can be made on the terms of the 10th clause. I am inclined to believe that all that is meant by "as customary at the port of lading" is "as usual," and that the clause must be construed as subject to the condition that the bill of lading is to be signed without prejudice to the stipulation as to freight and other terms of the charterparty. But I will assume that more was intended, and that it was intended that the master should sign the bill of lading in the form in which this bill of lading was signed. Even then I am clear that, unless there is a distinct expression of intention to the contrary, in such a case the charter must prevail. I believe the law to be that, when there is a charterparty, as between charterers and shipowners, the bill of lading operates primâ facie as a mere receipt for the goods, and a document of title which may be negotiated, and by which the

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property is transferred, but does not operate as a new contract, or alter the contract contained in the charterparty.

Then, with regard to the question of damages, this is a case where goods have been lost, not one where delivery has been delayed. I think the true rule is that the measure of damages in such a case must be the market value at the time when and place where the goods ought to have been delivered independently of any circumstances peculiar to the plaintiff, but deducting therefrom what he would have had to pay to get the goods. Applying that rule to the present case, I think that the contract by the plaintiffs for the sale of the goods is a matter peculiar to them, between them and third parties, with which the defendants have nothing to do. It is clear that this would be the case with a contract for sale of the goods at a higher price than the market value. With regard to the question as to the deduction of the advanced freight, it seems to me plain that, if this were to be deducted, the plaintiffs would be paying it twice over. I think that the defendants' appeal should be disallowed and the plaintiffs' appeal allowed.

Judgment accordingly.

Solicitors for plaintiffs: *Walton, Bubb, & Johnson.*
Solicitors for defendants: *W. A. Crump & Sons.*

E. L.

servations of LORD ESHER, M.R., d LINDLEY, L.J., at pp. 91, 94, plied. CARDIFF RATING AUTHORITY GUEST KEEN CO., LTD. [1948] All E.R. 830.

[IN THE COURT OF APPEAL.]

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Nov. 29, 30.

THE TYNE BOILER WORKS COMPANY, APPELLANTS: THE OVERSEERS OF THE PARISH OF LONGBENTON AND THE ASSESSMENT COMMITTEE OF THE TYNEMOUTH UNION, RESPONDENTS.

Poor-rate—Rating of Premises with Machinery—Machines used in connection with the Hereditament, but remaining Personal Property.

In estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon, for the purpose of making them fit as premises for such a manufactory, are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises.

APPEAL from the judgment of the Queen's Bench Division upon a special case stated by quarter sessions upon appeal against a poor-rate.

The facts stated in the special case are set forth at length in the report of the case in the court below (1), but briefly stated they were in effect as follows:—The appellants were the occupiers of premises known as the Tyne Boiler Works. Certain machinery and plant of a heavy nature, including an engine, boiler, shafting, travelling cranes, and other machinery, as described in the report of the case below, had been placed upon the premises. The whole of such machinery and plant were the property of the appellants, and not of the freeholders, and were required for the purpose of boiler making, and were arranged and adapted for use upon the premises for manufacturing and setting up boilers, and were so used; and further than appeared in the case there was not any intention on the part of the appellants of making such machinery and plant part of the soil or hereditaments, or of permanently annexing them thereto. The machinery and plant could be and were taken down and removed when and as required for repairs or rearrangement, or for any other purpose, without injury to themselves or structural damage to the hereditaments. The machines constituting the machinery and plant were each of them as machines, except so far as appeared in the case, separate and distinct from each other, and could be and were in practice

(1) 17 Q. B. D. 651.

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from time to time sold, renewed, and removed as separate and distinct articles. It will be seen on referring to the report below that some of the machines were not attached either to the soil or building, but rested by their own weight on the ground, or on cement or stone foundations specially prepared for them; while some of the machines were fixed as described in the case. The object of the attachment of the machines was to steady them, and it did steady them in working, and the method of attachment was convenient when occasion arose for their removal.

The mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant), and by making the statutory deductions from such rental.

The appellants contended that the machinery and plant were not any of them part of the freehold or hereditament, but were chattels, and that they were not nor were any of them rateable or to be taken into consideration as enhancing the rateable value of the hereditaments.

The respondents contended that the machinery and plant were necessary to the beneficial occupation of the premises as boiler works, that being the business to which they were appropriated, and that they ought to be taken into consideration as enhancing the rateable value of the premises to which they were attached.

The sessions considered that the case of *Laing* v. *Bishopwearmouth* (1) was conclusive, and held that the machinery and plant had been rightly taken into consideration in estimating the rateable value of the premises. The question for the Court was whether this decision was correct.

The Queen's Bench Division affirmed the decision of the quarter sessions.

Sir Horace Davey, Q.C., R. T. Reid, Q.C., and *Dodd*, for the appellants. Machines as mere chattels cannot be rated, but, if they have become part of the premises, they would be rateable as part of the hereditament rated. But it is impossible to understand

(1) 3 Q. B. D. 299.

on what principle things which remain movable chattels and are not part of the premises, and therefore are not in themselves rateable, can be taken into consideration in estimating the value of the hereditament. It is intelligible that, if the values of two things be taken together, the result is the sum of their values in conjunction; but it is utterly unintelligible how, if the value of one of them is to be excluded from the rate, it is to be taken into consideration as enhancing the value of the other. It may be possible to draw a verbal distinction between rating the chattel and taking its value into account as enhancing the value of the hereditament; but in substance the only mode of doing the latter is by adding its value to that of the premises, which is the same thing as rating it, and which, it is submitted, is really what has been done in this rate, however the case may put it in words. There are really only two alternatives, the machinery must either be rateable or not rateable. The true test of rateability must be whether the machines have been affixed to or become part of the premises in the sense that they would pass by a demise of the land. If they have, they are rateable, though they may be removable as tenant's fixtures. If they have not, they remain mere chattels, and as such are not to be taken into account in valuing the premises. It is contended that none of these machines have become attached to the premises in this sense. Loose machinery cannot be rateable. The 3 & 4 Vict. c. 89, expressly exempted from rating personal property which up till then had been by law rateable; and it is contended that, if such a rate as this is good, the effect of that Act is evaded. The Parochial Assessment Act (6 & 7 Wm. 4, c. 96), now defines the subject-matter of rating. By that Act it is a "hereditament" that is to be rated, and nothing but the hereditament, including all that is part of it, can be taken into consideration. It is submitted that the true rule to be collected from the various decisions on the subject previous to *Laing* v. *Bishopwearmouth* (1) is that for which the appellants contend. [They cited on this point and discussed *Rex* v. *Birmingham and Staffordshire Gaslight Co.* (2); *Rex* v. *Hogg* (3); *Rex* v. *St. Nicholas, Gloucester* (4); *Reg.*

(1) 3 Q. B. D. 299.
(2) 6 Ad. & E. 634.
(3) 1 T. R. 721.
(4) 1 T. R. 723.

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v. *Guest* (1); *Reg.* v. *Southampton Dock Co.* (2); *Reg.* v. *Haslam* (3); *Reg.* v. *North Staffordshire Ry. Co.* (4); *Reg.* v. *Lee* (5); *Reg.* v. *Halstead* (6); *Chidley* v. *West Ham* (7)]. Authorities before the passing of the 3 & 4 Vict. c. 89, which exempted personal property from rating, are not conclusive. The test is what would pass by a demise of the hereditament, not by a demise of a subject-matter so described as that it would include personalty used on the premises in addition to the hereditament. The term "boiler works" is an ambiguous term. A demise of such and such boiler works might possibly pass more than the hereditaments, but then the subject-matter of the demise would not all be rateable. It is begging the question to say that the boiler works are rateable as such, and then that a demise of the boiler works would include this machinery. In one sense, no doubt, the boiler works are rateable, but that is not the sense in which it is said that the machines would pass by a demise of them. The sessions proceeded on the case of *Laing* v. *Bishopwearmouth.* (8) If that case decides what the sessions supposed, it is contrary to previous authorities, and this Court is not bound by it. The principles laid down in that case are not disputed, but it is submitted that they were misapplied to the facts of the case. The Court purported to give effect to the earlier authorities, but it really went beyond them.

Admitting that some small effect might be given to the presence of the machinery as enhancing the value of the realty, and that a tenant would give a little more rent for the hereditament on account of the possibility of hiring the machinery in connection with it, it is clear from the case that the rate here goes further than that, and that under colour of taking the machinery into account in valuing the premises the machinery itself has been rated. The case states that the mode in which the rateable value of the premises was arrived at was by ascertaining the rental which a tenant would give for the use of them (inclusive of the machinery and plant). The question for the Court is

(1) 7 Ad. & E. 951.
(2) 14 Q. B. 587; 20 L. J. (M.C.) 155.
(3) 17 Q. B. 220.
(4) 30 L. J. (M.C.) 68.
(5) Law Rep. 1 Q. B. 241.
(6) 31 J. P. 373.
(7) 32 L. T. 486.
(8) 3 Q. B. D. 299.

whether the machinery and plant have been rightly taken into consideration in estimating the rateable value of the premises. They also cited *Reg.* v. *Lumsdaine* (1); *Rex* v. *White* (2); *Hellawell* v. *Eastwood.* (3)

Sir R. E. Webster, A.G., W. Graham, and *Hans Hamilton,* for the respondents. This case does not raise the question whether, assuming that these machines are to be taken into consideration in estimating the value of the premises, the valuation is correct so far as regards the manner in which they have been so taken into account. The sole question stated is whether they were rightly taken into consideration, i.e., whether it was right to take them into consideration. If it were true that their value as chattels had really been included in the rate that would be a distinct and separate ground of appeal. No question of quantum was raised at the sessions, or in the court below. If such a question had been raised the case would have been differently stated. These machines were not in the nature of loose movable machines or implements, such as trucks or wheelbarrows. Regarding the premises as boiler works, they all formed integral parts of the whole; and, if the works were to be continued as such, those things were essential to them. The question whether such things are fixtures is not the test for the purposes of rating. Nor is any physical attachment to the premises necessary. The idea that, in order to be taken into consideration as enhancing the value of the premises, the thing must be screwed or bolted to them has long been exploded. It is contended that the result of the decisions taken as a whole is that there need only be attachment to the premises in the sense that the thing is placed on the premises for the purpose of being used on the premises as an integral portion of them in their existing state and for their existing purpose, so long as they are used for such purpose. ome of the machines in this case are actually physically at tached and some perhaps may not be; but it is submitted that that is not the test. The test as stated in the decisions is whether the things would pass by a demise of the premises as such premises now exist. The premises are to be looked at as

(1) 10 Ad. & E. 157. (2) 4 T. R. 771.
(3) 6 Ex. 295; 20 L. J. (Ex.) 154.

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they exist for the purpose of rating, so that the question whether such machinery remains personalty or would be removable as between landlord and tenant and such like questions are quite immaterial. The subject of rating is not merely the land pure and simple, it is the hereditament in its existing state at the time of rating. So here it is not the land and the mere shell of brickwork, or whatever the structure of the buildings upon the land may be, that is to be looked to; but the land and works as they exist with the machinery and appliances which are necessary for boiler making and are intended to form part of the premises as a whole, while they are used for the purposes of boiler works. *Laing* v. *Bishopwearmouth* (1) does not go beyond the previous decisions. The principle that machinery such as this is to be taken into consideration as enhancing the rateable value of the hereditament was very early established by the decisions; and it is contended that none of the more recent decisions have really thrown any doubt upon it. *Reg.* v. *Lee* (2) was decided upon the same principle. In the case of *Chidley* v. *West Ham* (3) the only question was, whether the articles in question were themselves rateable, which is not the question here. In the case of *Reg.* v. *Halstead* (4) it would seem that the sessions had found that the articles were mere movable chattels, and the Court only held that they were not wrong in law in so doing. It must always be a question of fact for the sessions whether the articles are so attached to the premises as to enhance the value of the premises as such or not.

Sir Horace Davey, Q.C., in reply.

LORD ESHER, M.R. The first difficulty in this case is that of determining what the question is which the case raises. To that question we must confine ourselves, and not be led away to any other which the arguments presented to us may suggest. Looking to the respective contentions of the parties as stated in the case, and the form of the question which the Court is asked to decide, I am of opinion that the question which was disputed between these parties at the sessions, and which the sessions decided, was whether

(1) 3 Q. B. D. 299.
(2) Law Rep. 1 Q. B. 241.
(3) 32 L. T. 486.
(4) 31 J. P. 373.

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or not the articles and machinery in question were to be taken into consideration as enhancing the rateable value of the hereditaments. The sessions decided that they were properly taken into consideration in estimating the rateable value of the hereditaments, and the question for us is whether that decision was correct. I do not think that we are to say how they are to be valued as enhancing the rateable value. No such question as that appears to me to arise upon the case. The question is whether they are to be taken into consideration at all. It seems clear, also, that this was the question raised on the argument in the Divisional Court, for the argument for the appellants there was that "these machines cannot be taken into consideration as increasing the rateable value of the premises, unless they are so affixed as to be part of the inheritance." That being so, I do not think we are entitled to deal with any other question, which the argument before us may have raised.

We have therefore to decide whether these machines ought to be taken into account at all as enhancing the value of the hereditaments to be rated, not whether their effect in so enhancing the value of the hereditaments has been correctly estimated in this case. It seems to me obvious, on looking at the terms in which the case has been stated, that the case for the appellants was based upon the supposition that the decision in the case of *Laing* v. *Bishopwearmouth* (1) had gone further than any of the previous cases, and that therefore it could not be supported in this Court. If that is not so, then it follows that the argument for the appellants must attack not only that case but the previous cases on the subject as well. I do not think that the Court did in that case intend to overrule or go beyond the earlier cases, but, on the contrary, I think that they intended to adopt and apply the doctrine already laid down by them. It is said with respect to some of the cases that they are not authorities, because of the provisions of the statute passed with regard to the rating of personal chattels. Difficulties had arisen with regard to the question how far personal chattels were to be taken into consideration in rating the inhabitants of a parish. Those difficulties were set at rest by the statute 3 & 4 Vict. c. 89, but it had nothing to do

(1) 3 Q. B. D. 299.

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with the question how the value of real property is to be arrived at for the purpose of rating it. Nobody says that these machines are to be rated as personal chattels. The question is whether they are to be taken into account in estimating the rateable value of the premises, which it is admitted are liable to be rated. The statute, therefore, makes no difference, and all the cases with regard to estimating the value of real property remain untouched by it. It would be a strong measure, if we were now to overrule those cases, decided as they were by a Court to which the decision of this class of cases was particularly appropriated, and which, therefore, had a special familiarity with the principles involved by them. On the contrary, I think we ought to look upon their decisions as being the authorities from which to ascertain what the true rule is by which this case must be decided. I think it will appear, on looking at all the cases, that substantially the same idea has been present to the minds of all the judges who decided them throughout; but no doubt they have had some difficulty in exactly formulating the rule, and there is a certain amount of difference in the particular expressions which they have from time to time used. I will refer first of all to the case of *Reg.* v. *Haslam.* (1) Patteson, J., there says, "We do not think it necessary to determine whether the chambers erected on the appellants' premises are or are not annexed to the freehold, which is rather a question of fact for the court of quarter sessions to find than for us to decide, because we are of opinion that, according to the principles laid down in the various cases on the subject, the rateable value of the premises is undoubtedly increased by the use of these chambers." It is clear, I think, from this case that the learned judge did not think it necessary that the matters in question should be physically attached to the freehold. Then, again, in *Reg.* v. *Southampton Dock Co.* (2) Lord Campbell, C.J., said, "The fourth question arose upon a deduction claimed by the appellants which was disallowed. They contended that their cranes, steam-engines, and other like ponderous machinery, although attached to the freehold, ought to be treated as stock-in-trade and part of the capital which a tenant would have to invest in the business so as to diminish instead of increasing the rateable value of the

(1) 17 Q. B. 220. (2) 14 Q. B. 587; 20 L. J. (M.C.) 155.

property of the company. The sessions did find as a fact that these fixtures, worth 6450*l.* to an incoming tenant, although attached to the freehold, are capable of being detached from the freehold as easily and with as little injury to it as other fixtures put up for the purposes of the trade of the tenant, and usually valued as between incoming and outgoing tenant. But this is a rate upon buildings to which machinery is attached for the purposes of trade; and it has been solemnly decided that such real property ought to be assessed according to its existing value as combined with the machinery, without considering whether the machinery be real or personal property, or whether it be liable or not to distress or seizure under a fi. fa., or whether it would go to the heir or executor, or at the expiration of a lease to the landlord or tenant." And then he cites *Rex* v. *Birmingham and Staffordshire Gas Light Co.* (1) and *Reg.* v. *Guest* (2) as being to the same effect, the rule as laid down in the latter case being exactly in the terms employed by Lord Campbell, C.J. He therefore treats machinery which remains personal property as forming an element in getting at the value of the realty. He no doubt uses the expression "attached to it." Is his meaning, then, that the machinery must be physically attached as a fixture? I do not so understand it. I will now refer to the case of *Reg.* v. *Lee* (3), in which the subject was most elaborately treated. Blackburn, J., there cites *Reg.* v. *North Staffordshire Ry. Co.* (4) and *Reg.* v. *Southampton Dock Co.* (5), and proposes to follow them, saying that the same principle was there laid down and the same idea conveyed as in *Hellawell* v. *Eastwood.* (6) He does not therefore seem to think that there had been any alteration in the law since the earlier cases, and proposes to adopt the same rule as was stated in those cases. He says in stating the rule: "The articles may be divided into three classes: first, things movable, such as office and station furniture." It is clear that reference is there made to pure chattels. No one says that they are to be taken into account in arriving at the value of the hereditaments.

(1) 6 Ad. & E. 634.

(2) 7 Ad. & E. 951.

(3) Law Rep. 1 Q. B. 241; 35 L. J. (M.C.) 105.

(4) 30 L. J. (M.C.) 68.

(5) 14 Q. B. 587; 20 L. J. (M.C.) 155.

(6) 6 Ex. at p. 312; 20 L. J. (Ex.) at p. 160.

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He proceeds, "Secondly, things so attached to the freehold as to become part of it." No one doubts that they are to be taken into account, not merely as enhancing the value of the freehold, but as part of it. So that the two classes of things are taken first which are clearly on one side and the other of the line respectively, and which present no difficulty. Then a third class of articles is dealt with by the rule as expressed by the learned judge which are not purely and simply chattels for this purpose, though they remain chattels, and which are described as "things which though capable of being removed were yet so far attached as that they were intended to remain permanently connected with the railway or the premises used with it, and to remain permanent appendages to it as essential to its working." Here, no doubt, modes of expression are used which differ slightly from those used in other cases by other judges on the subject. The terms "permanently connected," "permanent appendages as essential to its working," form another mode of expressing the idea, but is not the idea intended to be conveyed the same as in the former cases? The learned judge, no doubt, further on, uses the expression, "If the things are annexed although but slightly." He certainly there meant to refer to a physical annexation. But then he was dealing with the particular case before him, where there was some degree of physical attachment. I do not think that he meant to say that nothing not physically attached could come under the third class of articles mentioned by the rule, or to overrule what was said by Patteson, J., in the case which I have before cited. Then in the same case, Lush, J., lays down the rule thus: "Now I apprehend that the premises to be rated are to be taken as they are with all their fittings and appliances by which the owner has adapted them to a particular use, and which would pass as part of the premises by a demise of them to a tenant. That seems to me to express what in other words has been expressed in the cases referred to by the other members of the Court." Further on he describes the matters there in question as all "fixed and so far annexed as to be intended to be permanent, and as really necessary for the use of the premises as gasworks;" and says that, "wherever the things have become so far a part of the

premises that they would pass by a demise of those premises, they would form a part of the rateable subject of the inheritance for the purpose of rating." Does the learned judge mean that the things must be fixed in the sense of physically being fixtures? I think not. I think that he means to lay down the same rule as that laid down by Blackburn, J., though he uses somewhat different words. Then we come to the case of *Laing* v. *Bishopwearmouth*. (1) There this question was discussed, and all the previous cases were gone through; and the Court clearly intended to adopt and act within the doctrines laid down by those cases, stating that they all lay down the same rule, and that, applying the rule established by them to the present case, it appears to them, after having carefully considered the character of the machinery in question, that the whole of it, though some of it may be capable of being removed without injury to itself or to the freehold, is essentially necessary to the shipbuilding business to which the appellants' premises were devoted, and must be taken to be intended to remain permanently attached to them so long as the premises were applied to their present purposes. Does the Court there mean by the word "attached," that the thing must be bolted or screwed to the premises, or some physical mode of attachment? I do not think so. I think that they could not have meant to differ from Patteson, J., when he said that it was unnecessary to inquire whether the machinery was or was not annexed to the freehold. If by "attached" the Court meant only physically attached, then a piece of machinery weighing many tons which rests by its own weight and which is never intended to be removed as long as the premises are used for the same purpose, but which is not bolted or screwed to the premises, is not to be taken into account; but, if there are some screws by which it is fixed, it is to be taken into account. Such a consequence seems to me to be monstrous. I do not think the Court meant by the word "attached" that physical attachment should be the test. It becomes therefore necessary to consider, what is meant by the word "attached" in the decisions on the subject. I may not succeed in expressing the rule which is to be deduced from the cases with absolute accuracy, but in endeavouring to do so, I will leave out the word "attached" or any other similar

(1) 3 Q. B. D. 299.

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expression. I believe the rule really to be that things, which are on the premises to be rated, and which are there for the purpose of making, and which make the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the rateable value of such premises. Of course it is not all things on the premises, or that are used on the premises, which are to be taken into account; but things which are there for the purpose of making, and which do make them fit as premises for the particular purposes for which they are used. It seems to me that, when things are brought into that category, they would pass by a demise of the premises as such as between landlord and tenant; and that so the test proposed by Lush, J., and that which I propose, become in substance identical. Taking that to be the proper test and applying it to the question in this case, I should say, in accordance with the opinion of Patteson, J., with regard to each of the articles in question, that it is immaterial to inquire whether they are or are not physically annexed to the freehold, and that they, all of them, come within the rule as I have expressed it. They are all on the premises for the purpose of making and they do make them fit as premises for the purpose for which they are used, and therefore in arriving at the rateable value of such premises they must be taken into account.

This conclusion appears to me to dispose of the case, for, as I have said before, I do not think we have to decide how they are to be valued in taking them into account. With regard to the case of *Chidley* v. *West Ham* (1) I do not say that the Court was not right in deciding as they did on the case as it came before them, but, if the right question had been asked them, I cannot understand how it could have been possible to say that the articles there in question ought not to have been taken into account in arriving at the rateable value. With regard to the decision in *Reg.* v. *Halstead* (2), I do not think that it has any important bearing on the present case. For these reasons I think the appeal must be dismissed.

LINDLEY, L.J. The first question is, what the property is which is to be rated and how it is to be described. It is described in

(1) 32 L. T. 486. (2) 31 J. P. 373.

the rate book as "Boiler works and land." And it seems to me that a good deal turns on the question whether that description is right or wrong. Nobody says that the property to be rated is improperly so described, and looking at the Parochial Assessment Act it does not seem to me that it was improper to rate it under that description.

For the purpose of deciding this case we must look at that Act and also the authorities which shew what has been the construction of the enactments with regard to rating from the beginning. So far as I can see, the Courts do not appear ever to have departed from the construction which was originally adopted by them. The Parochial Assessment Act says that no rate shall be of any force that is not made upon an estimate of the net annual value of the several hereditaments rated, and that the estimate is to be of the rent at which the same may reasonably be expected to let from year to year, subject to certain deductions; and then there is a proviso which seems not unimportant, though its wording is a little obscure: "Provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable." The estimate of value, therefore, is to be determined by an estimate of the rent which the hereditaments may be expected to command on a tenancy from year to year; and it seems to follow that the statute did not mean that they should be looked at merely as so much land, but that they should be taken as they are found, and that, if they are found with buildings on them, the estimate must be based on the rent for which they would let in that state from year to year. They are not to be treated as if demised as so much land, but as if demised as so much land with works or whatever structure is upon them. It is argued that in estimating the value of these works the value of the machinery mentioned in the special case is to be altogether left out. I cannot agree with that contention. Nothing is included, so far as I understand the nature of the machinery, which would be mere loose machinery and which would not pass to a tenant to whom the works were demised. The articles in question seem to come in the same category as millstones in a mill which would pass by a

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demise of the mill. They are part of the works taken as a whole. I cannot find among them anything that would not be included in such a hypothetical tenancy of the works as is contemplated by the Act. Physical annexation has never, so far as I understand the cases, been considered the test. *Rex* v. *Hogg* (1), *Reg.* v. *Haslam* (2), and many cases subsequent to the Act, seem to shew that the question whether there is physical annexation or not is not conclusive either way. We are asked, as it seems to me, to say that it is necessary, in order that machines may be taken into consideration in arriving at the rateable value, that they should have become part of the realty by attachment to it. I do not think that we can say this consistently with the Act and the previous decisions.

The only case that seems to me to present any difficulties is the case of *Chidley* v. *West Ham.* (3) But I think that the true view of that case is that it was decided on the ground that the tanks in question had been rated as mere personal property. I do not understand the case as deciding that they could not have been taken into account at all in fixing the rateable value of the premises. It would have been absurd to suppose on the facts stated that they would not have passed by a demise of the premises. I think that the true test in these cases is that stated by the Master of the Rolls.

LOPES, L.J. The question here is whether certain machines are to be taken into consideration in arriving at the rateable value of the works, such machines, it is alleged, not being either landlord's fixtures, or tenant's fixtures, or trade fixtures, and in some cases not being physically attached to the premises. It is clear that personal property such as machinery is per se not rateable, but, if attached so as to be either a landlord's fixture, or a tenant's fixture, or a trade fixture, it is equally clear that it is rateable as increasing the value of the premises, and the rent which a tenant from year to year would give for them. But then there are things, which, though they may not be physically attached, or may be removable without damage to themselves

(1) 1 T. R. 721. (2) 17 Q. B. 220.
(3) 32 L. T. 486.

or the freehold, are so placed on the premises, and so essential to their use for the purpose for which they are used, and so much intended to be used with them for that purpose, that they have practically become for the time being part of the premises. The question is whether such things are to be taken into account in estimating the rateable value of the premises. I am of opinion that they must be so taken into account. A long series of cases seems to me to establish this conclusion. The only case which appeared to me at first sight inconsistent with it was the case of *Chidley* v. *West Ham*. (1) But I think, if carefully looked into, that the true ground of that decision must have been that the tanks there were separately rated as personal property, which of course was wrong. Then the question arises whether the articles mentioned in this case come within the class of things which I have mentioned. I am of opinion that they do. I adopt the concluding words of the judgment of Mathew, J., in the court below, where he says that the machinery ought to be taken into account as essentially necessary to the business to which the premises are devoted and manifestly intended to remain connected with the premises so long as they are used for the same purposes. It is argued that, though the principle to which I have alluded is the result of a long series of cases, we ought to overrule these cases. I can see no reason for the suggestion. It seems to me that they are founded upon good sense and good law. For these reasons I think that the decision of the Court below was right, and should be affirmed.

Appeal dismissed.

Solicitors for the appellants: *Flux & Leadbitter, for Leadbitter & Harvey.*

Solicitors for the respondents: *Crossman, Crossman, & Prichard, for Kidson, McKenzie & Kidson.*

(1) 32 L. T. 486.

E. L.

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Oct. 27.

[IN THE COURT OF APPEAL.]

BLAIBERG AND ANOTHER *v.* BECKETT AND ANOTHER.

Bill of Sale—Terms for the Maintenance or Defeasance of the Security—Power of Sale—Provision exempting Purchaser from Inquiry as to Default—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule.*

A bill of sale contained powers for the grantees, upon default being made by the grantor in payment of any of the sums secured, to enter upon the premises and seize and sell the goods assigned, and a stipulation that upon any such sale the purchaser should not be bound to see or inquire whether any such default had been made:—

Held (affirming the decision of Fry, L.J.), that this stipulation was not for the "maintenance" or for the "defeasance" of the security, within the meaning of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and of the instructions given in the form in the schedule to that Act; that the effect of the stipulation was to alter, to the prejudice of the grantor, the legal rights which the Act and the form were intended to secure to him, and therefore that the bill of sale was void under s. 9 as not being in accordance with the form.

APPEAL from the decision of Fry, L.J., on an interpleader issue.

The plaintiffs in the issue claimed, as grantees under a bill of sale made by one Haymann, goods which had been seized in execution by the defendants upon a judgment recovered by them against Haymann.

By the bill of sale, made on the 12th of February, 1886, Haymann assigned to the plaintiffs, Blaiberg & Matthew, certain chattels and things specified in the schedule thereto by way of security for the payment of a sum of 150*l.* and interest thereon at the rate of 50 per cent.; and it was provided (inter alia) that if the grantor should make default in payment of the principal sum, or any part thereof, or the interest thereon, at the time thereinbefore provided for payment, and in other specified events, the grantees should have power to enter in and upon the premises on which the said chattels and things, or any of them, were or should be, and take possession of the whole or any part thereof, and after the expiration of five clear days from the day of so seizing or taking possession to remove, sell, and dispose of the same, or any of them, for such price or prices as could reasonably

be obtained. The bill of sale also contained the following clause: "And upon any such sale the purchaser shall not be bound to see or inquire whether any such default has been made as aforesaid."

At the trial of the issue Fry, L.J., held that the bill of sale was bad, on the authority of *Blaiberg* v. *Parsons*. (1)

The plaintiffs appealed.

H. Reed, for the plaintiffs. The clause providing that upon any sale of the goods the purchaser "shall not be bound to see or inquire whether any such default has been made as aforesaid" does not render the bill of sale void. That clause is a "term for the maintenance or defeasance of the security" within the words in italics in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. The phrase "the security" does not mean the goods assigned, but is meant to include all the rights of the grantee in respect of securing payment of his debt. The statute contemplates two classes of covenants which may be inserted in the bill of sale: first, the covenants specified in s. 7, which are "necessary for maintaining the security," and for the breach of which the chattels assigned may be seized; and, secondly, "terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." The effect of the decision of the Court of Appeal in *Ex parte Stanford, In re Barber* (2), is, that the parties may agree to any terms they please, so long as those terms are for the maintenance or defeasance of the security, and are not in contravention of the provisions of the Act and the schedule. Thus a power to enter upon the premises and seize, for the purpose of selling, the chattels is a power for the maintenance of the security; and a power to sell after entry and seizure is a power both for the maintenance and the defeasance of the security. In *Consolidated Credit Corporation* v. *Gosney* (3) the learned judges pointed out that the Act does not in terms provide for the insertion in a bill of sale of a power to sell the goods, but they said that such a power would be for the "defeasance" of the security, and that

(1) 17 Q. B. D. 336. (2) 17 Q. B. D. 259.

(3) 16 Q. B. D. 24.

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"defeasance" meant realization. The clause in question here is either for the maintenance of the security, because it has respect to the exercise of the power of sale which is inserted for the purpose of maintaining the right of the grantor to obtain payment of his debt, or it is for the defeasance of the security, because it has respect to the mode in which the sale shall be carried out and the rights of the grantees fully accomplished, so that the security may come to an end. It is a covenant commonly found in mortgage deeds. It is "in accordance with the form in the schedule," within the meaning of s. 9, because it does not alter the legal rights of the parties which the Act and the form sanction.

[LORD ESHER, M.R. A purchaser of the goods with notice that they were being sold under a bill of sale, would, but for this clause, be liable in a Court of Equity to an action by the grantor if the goods had been seized and sold without any default being made; but where the bill of sale contained this clause the grantor would have no right to recover against the purchaser, even though no default had been made. The position of the grantor is therefore altered; and if so, the bill of sale is bad within the rule stated in *Ex parte Stanford, In re Barber.* (1)]

It is submitted that the equitable rule which applies to a purchaser from a mortgagee selling under a power of sale contained in a mortgage of real estate, does not apply to a mortgage of chattels, because on a transfer of chattels the property in them passes absolutely to the transferee. *Blaiberg* v. *Parsons* (2), which Fry, L.J., followed in the present case, was wrongly decided.

Crump, Q.C. (*J. J. Sims*, with him), for the defendants. The terms which the parties to a bill of sale may insert must be such as are for the maintenance or defeasance of the security in the opinion of the Court, not by the agreement of the parties, who cannot by any agreement inter se override the provisions of the Act: *Furber* v. *Cobb.* (3) The clause in question cannot be for the maintenance of the security, because it only comes into operation when the goods are sold and the security is at an end. Nor is it a defeasance, which, according to the legal meaning of

(1) 17 Q. B. D. 259. (2) 17 Q. B. D. 336.
(3) 17 Q. B. D. 459.

the word, is something to defeat the operation of a deed before the expiration of the time named in the deed, and is contained in another deed or document: *Ex parte Popplewell, In re Storey* (1), judgment of Jessel, M.R., at p. 81: see also, Com. Dig. title "Defeasance." The effect of this provision, that the purchaser shall not be bound to see or inquire whether any default has been made, is to alter the legal effect of the transaction permitted by the Act and the form, because the grantor by reason of the provision loses the remedy he would otherwise have against a purchaser who bought the goods with notice of the bill of sale where no default had been made under it. The bill of sale is therefore void according to the rule laid down in *Ex parte Barber, In re Stanford.* (2)

H. Reed, in reply. Admitting that this clause is not strictly a defeasance, because not contained in another deed or document, still it is something which defeats or controls the grant contained in the bill of sale, and is therefore a defeasance within the meaning of the Act. The provisions of s. 7 are restrictive only. No powers of entry on the premises, or of sale, are given in express terms by that section, yet those powers are commonly and properly inserted in bills of sale, and they are for the maintenance of the security. When the power of sale is exercised there is a defeasance of the security because the whole transaction is thereby put an end to. This condition, therefore, being in respect of the exercise of the power of sale, is for the defeasance of the security.

[The bill of sale also contained a covenant for further assurance, and a covenant by the grantor to pay all rates, taxes, and outgoings to become due and payable in respect of the premises on which the goods were. It was contended by counsel for the defendants that those covenants rendered the bill of sale void; but as the Court of Appeal gave no decision upon them, it is thought unnecessary in this report to set them out, or to state the arguments of counsel with respect to them.]

LORD ESHER, M.R. Three objections have been taken to the bill of sale in this case. In all of them it was objected that the

(1) 21 Ch. D. 73. (2) 17 Q. B. D. 259.

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bill of sale was in contravention of s. 9 of the Act of 1882—that is to say, that the form was not "in accordance with the form in the schedule," within the definition laid down by this Court in *Ex parte Stanford, In re Barber.* (1) It is not necessary to express any opinion with respect to two of these objections, and I will not express any, because I think that the third is fatal to the bill of sale. The stipulation complained of is an agreement by the parties that, on any sale by the holder of the bill of sale, the purchaser shall not be bound to see or inquire whether default has been made by the grantor in payment of the sums secured. It was said on behalf of the plaintiffs that this stipulation was within the form in the schedule, because it was a stipulation "for the maintenance or defeasance of the security."

It has been argued that the stipulation is either for the "maintenance" or for the "defeasance" of the security—one or the other. It is said that a stipulation giving the grantee of a bill of sale power to enter upon the premises in order to seize and sell the goods assigned would be a term for the maintenance of the security: that the form in the schedule to the Act does not contain any express power to sell after entry; that a provision containing such an express power of sale would also be for the maintenance or defeasance of the security, and that, if so, this stipulation is either for the maintenance of the security, because it has regard to the exercise of the power of sale, or it is for the defeasance of the security, because it has regard to the mode in which the sale, which puts an end to the security, shall be carried out. It is said, therefore, to be in accordance with the form in the schedule. We have first to decide whether this stipulation is, or is not, a term for the maintenance or defeasance of the security. It is said that the parties to the bill of sale may agree to whatever terms they like, so long as they are for the maintenance or defeasance of the security, and do not contravene the provisions of the Act; and I think that may be true. Now, a stipulation which does not operate until after the power of sale has been exercised does not seem to me for the maintenance of the security. The sale of the goods is the full accomplishment of the security on behalf of the grantee. In *Ex parte Popplewell*,

(1) 17 Q. B. D. 269.

In re Strong (1), the late Master of the Rolls states what a defeasance is. It is something which defeats the operation of a deed. It is true that he says that a defeasance is contained in another deed or document, and that, if contained in the same deed, it is a condition, not strictly a defeasance. I am of opinion that what is meant by "a term for the defeasance of the security" in the Act of 1882 is in strictness a condition in the nature of a defeasance. If, therefore, a condition contained in the bill is one which fulfils instead of defeating the operation of the deed, it is not, and cannot be, a term for the defeasance of the security. Applying that test, a condition that the grantee may sell the goods on default being made in payment of the sums secured is not a condition in the nature of a defeasance, and it follows that a condition that the purchaser shall not be bound to inquire whether any default has been made is also not a condition in the nature of a defeasance. Now what is meant by the maintenance of the security? What is the security? The goods are the security, which under certain conditions are put in the power of the grantee, and with which he may pay himself the debt secured. A condition giving him power to enter upon the premises and seize the goods may be a condition for the maintenance of the security. A power of sale may be for the maintenance of the security, but it does not follow that a condition that, when the right to sell is exercised, the buyer shall not be bound to see or inquire whether any default has been made by the grantor, is a condition for the maintenance of the security. Can a condition which is to regulate the price paid by the buyer be fairly said to be for the maintenance of the security? As I have said, it only comes into effect when the goods are sold. At that time there is no security existing, no security wanted. I am therefore of opinion that the condition in question here is not for the maintenance of the security, and, for the reasons I have given, that it is not a condition in the nature of a defeasance. It is therefore not within the words in italics in the form given in the schedule, and it is therefore an addition to the form. Then comes the question, is it an immaterial addition, or is it within the rule laid

(1) 21 Ch. D. 73, at p. 81.

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down in *Ex parte Stanford, In re Barber*? (1) Does it alter the legal effect which would attach to the bill of sale if drawn in the prescribed form? I think it does. Now, whether a bill of sale drawn in the prescribed form does, or does not, give the grantee a power to sell the goods on default is, I think, immaterial to consider for this purpose. I will assume that it does. But the power to sell is only in case of default. If, therefore, the buyer knows that he is buying the goods from the holder of a bill of sale it is clear that, if there were no such condition as this in the bill, he would be bound in a Court of Equity to inquire whether any default had been made by the grantor, or to take the risk of not inquiring. If no default had been made, the grantor would have his remedy against him. But there would be no such remedy against him if this condition were in the bill of sale, because the buyer would know that he was buying under a bill of sale by the terms of which the grantor had agreed that the buyer need not inquire whether any default had been made. The position therefore of the grantor would be altered. He would have a remedy only against the grantee instead of against the grantee and the buyer. I am of opinion that this condition is one not authorized by the Bills of Sale Act and the form in the schedule; that it is a condition which alters the position of the grantor in the way I have stated, and therefore alters the legal effect of the transaction permitted by the statute and the form. Fry, L.J., expressed no opinion upon the point when the case was heard by him, thinking himself bound by the decision of the Queen's Bench Division in *Blaiberg* v. *Parsons*. (2) I think that decision was right, and that this appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. I express no opinion upon the other points. We only decide what is the effect of the clause in this bill of sale which provides that the purchaser of the goods shall not be bound to see or inquire whether any default has been made by the grantor. That clause seems to me a direct violation of the statute and the form. It has been attempted to be supported on the ground that its inser-

(1) 17 Q. B. D. 259. (2) 17 Q. B. D. 336.

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tion is warranted by the words in italics in the form. It becomes necessary to consider what is the meaning of those words. What is the meaning of "the security"? It is clear to my mind that "security" is not synonymous with "goods and chattels." The term "defeasance" does not apply to goods and chattels. You cannot defeat goods and chattels. Therefore "the security" must mean something more. I am of opinion that it means the title to the goods and chattels, and that anything which relates to the maintaining of that title is something for the maintenance of the security. Next, what does the word "defeasance" mean? It is said that the sale of the goods is a defeasance of the security. I think that view is untenable. Defeasance, to my mind, means something in the nature of redemption. It does not mean something which puts an end to the grantor's power to redeem. One cannot give the strict meaning to the word as it is used in the Act, because the Act contemplates that the clause which is for the defeasance of the security shall be contained in the bill of sale itself. It is to be observed that the Bills of Sale Act, 1878, s. 10, sub-s. 3, provides, that if the bill of sale be made or given subject to any defeasance, &c., "not contained in the body thereof," such defeasance, &c., shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before registration, shewing that the legislature intended the technical meaning of defeasance. I think that the clause in question is not for the defeasance of the security, because it is a clause which has the effect of defeating the title, not of the grantee, but of the grantor. Next, has the clause in question anything to do with the maintenance of the security? Does it, or does it not, maintain the title to the goods? The object of the clause is to give a good title to the goods to a purchaser from the grantee of the bill of sale, in order that the goods may become irredeemable by the grantor, although there has been no forfeiture incurred by him. I am of opinion that the clause does not maintain the title of the grantee. It is a mischievous clause, looking at it from the point of view of the legislature in enacting provisions for the protection of grantors of bills of sale. It is a clause which is not warranted by s. 9 of the Act. I am of opinion, therefore, that the bill of sale is void.

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LOPES, L.J. I propose only to deal with the objection that this bill of sale is invalidated by reason of the clause which provides that any purchaser of the goods shall not be bound to see or inquire whether any default has been made by the grantor. Though s. 7 of the Bills of Sale Act, 1882, does not in direct terms give the grantee a right to take possession of the goods in the cases therein specified, I think such a power is implied. I am not prepared to say whether an express power of sale contained in a bill of sale is in accordance with the form given in the schedule, but I am clear that the clause in question here is neither for the maintenance nor the defeasance of the security. It is something which is to operate subsequently to and independently of both maintenance and defeasance. It is a provision in relief of the purchaser of the goods, in favour of the grantee, and to the prejudice of the grantor. It puts him in the power of the grantee, makes unassailable the legal position of the purchaser in respect of his title to the goods, raises difficult and complicated questions with respect to the legal rights of the parties to a transaction which the legislature intended should be simple and intelligible, and alters the legal position of the grantor. I am, therefore, of opinion that the judgment of Fry, L.J., was right.

Appeal dismissed.

Solicitor for plaintiffs: *N. White.*
Solicitor for defendants: *R. F. Hill.*

W. A.

THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT AND DITTMAR.

1886 *Nov.* 26.

Practice—County Court—Certificate for Costs on Higher Scale—County Courts Salaries Act, 1882 (45 & 46 *Vict. c.* 57), *s.* 5—*Prohibition.*

In awarding costs on the higher scale to a successful party under s. 5 of the County Courts Salaries Act, 1882, it is not sufficient for the judge to certify that the action involved a question of character.

Per Stephen, J. A certificate under s. 5 should follow the language of the section.

Quære, whether the Court will inquire into the sufficiency of the grounds of a certificate so framed.

RULE calling upon the judge of the City of London Court and Otto Dittmar, the defendant in an action of *Beard* v. *Dittmar*, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding to enforce the payment of costs on the higher scale in the said action.

In the action, which was to recover the sum of 5*l.* 5*s.* for goods sold and delivered, the judge gave judgment for the defendant, but allowed the plaintiff to have the case re-heard before a jury. The jury having found a verdict for the defendant upon a plea of payment, the defendant's counsel applied to the judge to allow costs on the higher scale under the provisions of the County Court Salaries Act, 1882 (45 & 46 Vict. c. 57), s. 5, and the judge certified as follows: "Question of character; costs on higher scale."

The plaintiff moved before a Divisional Court for a rule nisi for a writ of prohibition to prevent the enforcement of this certificate, and the certificate having been referred back to the judge by the Court for an explanation of his reasons for granting it, he returned a written answer, of which the following are the material parts:—"This case involved a question of character, that question being whether the defendant was to be believed or not. . . . . In so doing I considered that it was a question of public or general importance that a defendant accused practically of swearing falsely should not be punished in costs while he succeeded on the merits. And in making the certificate in these words—question of

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character; costs on higher scale—I intended to certify under the Act 45 & 46 Vict. c. 57." (1)

The present rule was then granted.

Stephen Lynch, for the plaintiff.

STEPHEN, J. I am of opinion that the prohibition must go, upon the ground that the certificate of the learned judge does not come within the section of the statute. It is dangerous to make broad propositions, but I am unable to conceive of a case in which the character of an individual could rightly be considered to be a matter of public interest. However it is quite clear that in such a case as the present the question whether one of the parties has committed perjury cannot be held to be a question of general or public interest within the meaning of the section; and it certainly raises no novel or difficult point of law. The only certificate which would satisfy me would be one in the terms of the statute, without qualification or explanation; whether the Court could go behind such a certificate upon affidavit I do not give an opinion. But I emphatically say that the certificate in the present case does not fall within the section.

A. L. SMITH, J. I am of the same opinion. This certificate gives the reason for which it was granted; that the question raised by the case was whether the defendant was to be believed on his oath. How can it be said that such a question was one of general or public interest?

Rule absolute.

Solicitor for plaintiff: *Moojen.*

(1) By 45 & 46 Vict. c. 57 (County Courts Salaries Act, 1882), s. 5: "Notwithstanding any Act of Parliament or any rule to the contrary, it shall be in the power of the judge of a county court to award costs on the higher scale to the plaintiff on any amount recovered, however small, or to the defendant who successfully defends an action brought for any amount, however small, provided that the said judge certify that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons or of general or public interest."

W. J. B.

THE LEAMINGTON PRIORS GAS COMPANY, APPELLANTS; DAVIS, RESPONDENT.

1886
Nov. 26.

Gasworks—Gasworks Clauses Acts, 1847, 1871 (10 *Vict. c.* 15, *ss.* 38, 49; 34 *&* 35 *Vict. c.* 41, *ss.* 1, 3, 35)—*Leamington Priors Gas Company's Act*, 1865 (28 *Vict. c. cxxviii.*)—*Special Provisions as to Accounts in Special Act—Incorporation of subsequent General Act containing inconsistent Provisions as to Accounts.*

The Leamington Priors Gas Company's Act, 1865 (28 Vict. c. cxxviii.) which incorporated the Gasworks Clauses Act, 1847, except so far as it might be varied by any provision of the special Act, prescribes by s. 32 a special form in accordance with which the annual accounts of the company were to be made up, in lieu of provisions as to accounts contained in s. 38 of the Act of 1847. By s. 49 of the Act of 1847, undertakers are not to be exempted from any general Act relating to gasworks which may be passed in any future session. By s. 1 of the Gasworks Clauses Act, 1871, that Act and the Act of 1847 are to be construed as one Act, and by s. 35 of the Act of 1871, the undertakers are to make an annual statement of accounts in the form prescribed by that Act, and to furnish copies of the same to any applicant.

The appellants made out their annual statement of accounts in the form prescribed by s. 32 of their special Act, and did not furnish to the respondent, on application, a copy of an annual statement of their accounts made out in the form prescribed by the Act of 1871:—

Held, that as the appellants' special Act prescribed the form in which the annual statement of accounts was to be made up, the provisions relating to the form of accounts in s. 35 of the Gasworks Clauses Act, 1871, did not apply.

Dudley Gasworks Co. v *Warmington* (50 L. J. (M. C.) 69) distinguished.

CASE stated under 20 & 21 Vict. c. 43.

On the 19th of March, 1886, the appellants appeared to an information preferred by the respondent charging them "that they on the 19th of January, 1886, unlawfully did not keep and sell to the respondent, who then applied for the same at their offices, a copy of the last annual statement of accounts of the said company, made up at the times and in the form and containing the particulars specified in Schedule B of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41)." It was proved and found as a fact that the appellants had made default in furnishing to the respondent a copy of their last statement of accounts made up as required by s. 35 of the Gasworks Clauses Act, 1871, believing that they were not required to comply with the provisions of that section, but with the requirements of their

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special Act, in accordance with which their accounts had theretofore been made up. Upon the hearing the appellants were duly convicted and adjudged to pay a fine of forty shillings.

The appellants were incorporated in 1865 by a special Act (28 Vict. c. cxxviii.), by s. 3 of which it is enacted that "The Gasworks Clauses Act, 1847, shall be incorporated with and form part of this Act, except in so far as any of the clauses of the Gasworks Clauses Act, 1847, may be varied by or are repugnant to the provisions of this Act."

The Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 38, enacts that the undertakers shall prepare an annual statement of account, and forward a copy thereof to the clerk of the peace, but prescribes no special form in which the account shall be made out.

By s. 32 of the appellants' special Act, it is provided that "In lieu of the account prescribed by the 38th section of the Gasworks Clauses Act, 1847, an account in the form, and containing the particulars specified in the schedule to this Act, shall be made up to the day at which the books of the company shall be balanced in each year. . . ." By a resolution of the company their accounts were made up to the 30th of June in each year.

The Gasworks Clauses Act, 1847, s. 49, enacts that "nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to gasworks . . . . which may be passed in the same session in which the special Act is passed, or any future session of parliament."

By s. 1 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), it is enacted that "The Gasworks Clauses Act, 1847 and this Act shall be construed together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act;" and by s. 3 of the same Act "the provisions of this Act shall apply to every gas undertaking authorized by any special Act hereafter passed. . . . . save where the said provisions are expressly varied or excepted by any such special Act . . . ."

The Gasworks Clauses Act, 1871, s. 35, requires the undertakers "to fill up and forward to the local authority on or before the 25th of March in each year, an annual statement of accounts

made up to the 31st of December then next preceding, as near as may be in the form and containing the particulars specified in the Schedule B to this Act annexed. The undertakers shall keep copies of such annual statement at their office, and sell the same to any applicant at a price not exceeding one shilling for each such copy. In case the undertakers make default in complying with the provisions of this section, they shall be liable to a penalty not exceeding forty shillings for each day during which such default continues."

The form of accounts contained in Schedule B to the Act of 1871 was entirely different from that prescribed by the appellants' special Act.

The question for the opinion of the Court was whether s. 35 of the Gasworks Clauses Act, 1871, applied to the appellant company so as to require them to keep their accounts in the form given in Schedule B to that Act, and to furnish copies; or whether the provisions of the appellants' special Act as to accounts prevailed, so as to require them to keep their accounts in the form given in the schedule to their said special Act.

Shiress Will, Q.C., for the appellants. The 35th section of the Act of 1871 does not apply to the appellants, who are bound to keep their accounts in the form prescribed by their special Act. The fact that the General Acts of 1847 and 1871 are to be read together does not so incorporate the Act of 1871 in the appellants' special Act as to repeal the special provisions therein as to the mode of keeping the accounts. Where a special Act simply incorporates the Gasworks Clauses Act, 1847, the Act of 1871 will, by virtue of the provisions of its 1st section, be also incorporated for all purposes in the special Act, and the undertakers must keep their accounts in the form prescribed in the schedule to the Act of 1871: *Dudley Gas Co.* v. *Warmington* (1); but in that case the special Act contained no provisions as to the form of accounts. Here the appellants' special Act contains a special provision in lieu of those contained in the Act of 1847, and s. 35 of the Act of 1871 does not operate to repeal it. [He was stopped.]

(1) 50 L. J. (M.C.) 69.

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W. J. Noble, for the respondent. Sect. 35 of the Act of 1871 was inserted for the protection of gas consumers, and with the object of procuring uniformity in statements of accounts. It is true that the Act of 1847 is incorporated in the special Act only so far as it is not varied by any provision of the latter; but s. 49 of the former Act does not come within the exception, and therefore, the appellants not being exempted from the provisions of the Act of 1871, s. 32 of the special Act is amended by s. 35 of the Act of 1871. There is no valid distinction between *Dudley Gas Co.* v. *Warmington* (1) and the present case.

STEPHEN, J. Upon a careful examination of these various sections their effect seems to be perfectly intelligible. It is true that s. 49 of the Act of 1847, which is incorporated in the appellants' special Act, provides that they are not to be exempted from any future general Act; and they are therefore certainly not exempted from the Act of 1871. But the appellants' special Act, in incorporating the Act of 1847, expressly excluded the 38th section of that Act from the incorporation, and made special provisions in lieu of those contained in that section; so far as regards that section and the mode of keeping accounts the Act of 1847 was therefore never incorporated in the special Act. The 35th section of the Act of 1871, prescribing the special form of keeping accounts, amounted to a repeal of s. 38 of the Act of 1847; but that latter section never was incorporated with the appellants' special Act, and therefore the 35th section of the Act of 1871 is not impliedly incorporated in it. I think, therefore, that the provisions of the Act of 1871 relating to the special form of accounts do not apply to the appellants. I quite feel the force of the respondent's contention and the authority of the decision in *Dudley Gas Co.* v. *Warmington* (1); but that case merely determines that, where there is no special provision in the special Act, then the mode of keeping accounts is to be changed in accordance with the provisions of s. 35 of the Act of 1871. Our judgment must be for the appellants.

A. L. SMITH, J. I am of the same opinion. The fact that the appellants' special Act contained special provisions as to the

(1) 50 L. J. (M.C.) 69.

mode of keeping accounts in lieu of those in the General Act of 1847 entirely distinguishes this case from *Dudley Gas Co.* v. *Warmington.* (1)

Conviction quashed.

Solicitors for appellants: *Gregory, Rowcliffes, & Co., for Wright & Hassall, Leamington.*

Solicitor for respondent: *Tyrrell, for Passman, Leamington.*

W. J. B.

EX PARTE WEBBER. IN RE WEBBER.

Nov. 29, 30.

Bankruptcy—Assets—Voluntary Allowance—Retired Officer of Indian Army—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 53.

A voluntary allowance granted by the Secretary of State for India to an officer of the Indian army on compulsory retirement, to which the recipient has no claim or right, and which can be withdrawn at any time at the discretion of the Secretary of State, is not "income" within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, sub-s. 2, and therefore an order cannot be made for the payment of such allowance to the trustee in bankruptcy of the recipient.

APPEAL by the bankrupt from an order of the judge of the county court at Norwich, dated the 24th of May, 1886, directing that the sum of 50*l.* a year be paid to the trustee under s. 53, sub-s. 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). (2)

The bankrupt had been an officer in the Indian army. His name had been compulsorily removed from the effective list of the army, and an allowance of 7*s.* a day, payable quarterly, granted to him by the Secretary of State for India, under the powers given by s. 41 of the Act for the better Government of

(1) 50 L. J. (M.C.) 69.

(2) 46 & 47 Vict. c. 52, s. 53, sub-s. 1, gives power to the Court to order that a portion of the bankrupt's pay or salary be paid to the trustee in cases where the bankrupt is an officer in the army or navy, or is employed in the civil service of the Crown.

By sub-s. 2: "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct."

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India (21 & 22 Vict. c. 106), by which the expenditure of the Indian revenue is placed under the control of the Secretary of State for India in Council.

The appeal came before the Divisional Court during the Trinity sittings, and was directed to stand over in order that evidence might be obtained as to the nature of the allowance.

The bankrupt made an affidavit, which was not contradicted, and which stated that the allowance was what is called a "compassionate allowance."

The affidavit contained the following statements:—"There is no special fund for the payment of this allowance. It is paid out of the general Indian revenues, and is debited to the civil and not military charges. It is in no way a charge on the English revenues, or payable thereout.

"The allowance is of an entirely different nature to a pension, half-pay, or other payment of that kind. It is not provided in the regulations of the service, and the granting of it does not form one of the terms upon which the recipient originally entered the service. The recipient has no claim or right to it. The grant is a voluntary act of grace, being, in fact, made in special cases where the recipient has no claim to a pension."

The affidavit further stated that the allowance was in the discretion of the Secretary of State, that its continuance depended on the recipient's means, and it could be withdrawn at discretion.

The Secretary of State for India had stated, in answer to an application by the solicitor to the trustee, that if the Court made an order under s. 53 of the Bankruptcy Act, 1883, such order would be acted on.

Swinfen Eady, for the bankrupt in support of the appeal. There is no power to make this order. The allowance is for the personal benefit of the recipient, not for the benefit of his creditors. It could not be taken in execution: *Lucas* v. *Harris* (1), nor could it be assigned: Army Act, 1881 (44 & 45 Vict. c. 58), s. 141. It is equally clear that it does not come within the terms of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, sub-s. 2.

(1) See post, p. 127.

It cannot be contended that any of the words of that clause apply, except the word "income," and the decision in *Ex parte Wicks, In re Wicks* (1) shews that a voluntary allowance, to which the recipient has no claim, either legal or equitable, is not "income" within the meaning of the Act. *Ex parte Huggins, In re Huggins* (2) is distinguishable, because there the pension was secured by the vote of the colonial legislature.

J. H. Gregson, for the trustee. The cases referred to for the appellant were decided under the Bankruptcy Act, 1869, and the words of the Act of 1883 are more comprehensive. Sub-s. 3 of s. 53, which expressly reserves to chief officers of public departments power to declare the pension, half-pay, or compensation of a bankrupt to be forfeited, shews that the legislature contemplated the application of sub-s. 2. It makes no difference that the allowance is revocable. Half-pay and pensions are revocable, and cannot be recovered at law or in equity: *Flarty* v. *Odlum* (3); *Ex parte Sir Charles Napier* (4); *Grant* v. *The Secretary of State for India* (5); *Cooper* v. *The Queen*. (6)

In *Ex parte Wicks, In re Wicks* (1), the allowance would have been withdrawn if an order had been made, so that an order would have been useless; this is not so here. In *Ex parte Benwell, In re Hutton* (7), it was sought to set aside future earnings; here the allowance had been earned by past services.

Eady was not heard in reply.

CAVE, J. The question for our decision is whether this compassionate allowance comes within the terms of the 53rd section of the Bankruptcy Act, 1883. It is not necessary to give any opinion as to half-pay, or pension, or compensation granted by the Treasury; on the contrary, we ought to confine ourselves to the matter in hand, which is the "compassionate allowance." The nature of the allowance is shewn by the affidavit of the bankrupt, which is not contradicted by any evidence on the part of the trustee, and it is only necessary to read that affidavit in order to see how completely this allowance differs from half-pay or pension

(1) 17 Ch. D. 70.
(2) 21 Ch. D. 85.
(3) 3 T. R. 681.
(4) 18 Q. B. 692; 21 L. J. (Q.B.) 332.
(5) 2 C. P. D. 445.
(6) 14 Ch. D. 311.
(7) 14 Q. B. D. 301.

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or compensation granted by the Treasury. It differs mainly in this, that the granting of the allowance does not form part of the terms on which the recipient enters into the service, but it is made with reference to the circumstances of each particular case, and is revocable, and would be withdrawn if owing to any change in the circumstances of the recipient he no longer needed it. It is urged on behalf of the trustee that half-pay is not recoverable, but in my opinion that is not the true test. We must follow the decision in *Ex parte Wicks, In re Wicks* (1), which shews that the true test is whether the allowance is purely voluntary, or whether the recipient has some kind of claim to it. For instance, if a private individual agrees with a servant to pay him so much a year while he remains in service, and to give him a retiring allowance after a certain period, there the servant would have a right to the retiring allowance. But suppose there were no terms as to any allowance, but the master made a voluntary allowance, there the servant would have no right or claim. That according to the decision in *Ex parte Wicks, In re Wicks* (1), is the governing principle. In the present case it is clear from the bankrupt's affidavit that the allowance resembles the voluntary bounty of an individual, and not an allowance made in pursuance of any terms. It is said that the Secretary of State writes that if the Court makes an order it will be obeyed; but that to my mind is immaterial, for he only says that if the Court came to the conclusion that the allowance was within the terms of the Act he would obey the law. I am of opinion that the present case is covered by the principle of the decision in *Ex parte Wicks, In re Wicks* (1), and that the order of the county court judge must be set aside.

A. L. SMITH, J. This is an appeal from the order of the county court judge setting aside a sum of 50*l.* a year for the benefit of the creditors of the bankrupt under s. 53 of the Bankruptcy Act, 1883. The question is whether a "compassionate allowance" is within the Act. Mr. Webber's affidavit shews that it is purely a voluntary bounty, in fact a gift. It is clearly not within the 1st sub-section of s. 53, so we must ascertain whether it comes within

(1) 17 Ch. D. 70.

any of the words of sub-s. 2. It is not half-pay, or pension, or any compensation granted by the Treasury, and I do not mean to deal with those kinds of payment. The only remaining words are "salary or income." It is not salary, and as the authorities stand it is not income, for the case of *Ex parte Wicks, In re Wicks* (1), decides that a voluntary gift is not income within the meaning of such a clause as s. 53 of the Act.

It seems to me therefore that an order cannot be made under s. 53.

Appeal allowed.

Solicitor for the bankrupt: *C. F. Martelli.*

Solicitor for the trustee: *J. O. Jacobs.*

P. B. H.

In re UNDERHILL. *Nov.* 22.

Bankruptcy—Practice—Motion—Vivâ Voce Evidence.

Where parties agree that the evidence on the hearing of a motion shall be taken vivâ voce instead of by affidavit it is unnecessary to obtain the leave of the judge, but written notice must be given to the clerk of the Court, who will enter the case in a special list of motions to be heard with vivâ voce evidence, and an application must subsequently be made to the Court to fix a day for the hearing of the motion.

Where there is no such agreement a motion for leave to take the evidence vivâ voce must be made in the usual way.

This was an ex parte application that the evidence on the hearing of a pending motion might be taken vivâ voce instead of by affidavit. The consent of the opposite party had not been obtained, and no notice of the application had been given.

H. Reed, for the application.

Cave, J. This application is misconceived, and I think it desirable to lay down a rule in cases where it is desired that the evidence on a motion shall be taken vivâ voce and not on affidavits. Where parties agree that the evidence on the hearing of a motion shall be vivâ voce, it is unnecessary to apply to the Court, but a written notice must be given to the clerk of the

(1) 17 Ch. D. 70.

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Court (Mr. Falkner), who will enter the motion on a list to be heard with vivâ voce evidence, and an application must afterwards be made to the Court to fix a day for the hearing of the motion. Where parties cannot agree, then a motion must be made for the purpose in the ordinary way.

Solicitors for applicant: *Thomson & Ward.*

H. L. F.

Nov. 23.

IN RE WATSON. EX PARTE PHILLIPS.

Executor and Administrator—Contracts made whilst no Personal Representative—Ratification by Administrator, Effect of—Services for Benefit of Estate.

In order to make the estate of a deceased person liable for services rendered whilst there is no personal representative, it must be shewn, not only that the services were for the benefit of the estate, but that they were rendered under a contract with someone who subsequently by obtaining letters of administration became authorized to bind the estate, and ratified the contract.

MOTION by way of appeal from a decision of Field, J., at chambers, refusing an application to direct a review of taxation of costs.

On the 12th of May, 1877, Mrs. Harriett Cross died, having duly made her will and appointed an executor thereof, who renounced probate. Thereupon Ann Phillips, a sister of the deceased, instructed T. R. Watson, a solicitor, to take steps to prevent her nephew from obtaining letters of administration; and on the 7th of August, 1877, an agreement was executed by Ann Phillips and other relations of the deceased, including Robert Phillips, the present applicant, whereby Watson was retained to perform services as a solicitor in respect of the obtaining letters of administration, and in other respects relating to the estate.

On the 3rd of September, 1878, letters of administration with the will annexed were granted to Ann Phillips and Catherine Noyes, who was a sister of the deceased, and one of the parties to the agreement of the 7th of May, 1877.

Ann Phillips died on the 4th of September, 1879, and Catherine Noyes died on the 12th of December, 1879.

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At the latter date Watson had performed all the work in respect of which he was retained under the agreement.

Shortly after the death of Catherine Noyes, one Easton, who had married Ann Phillips' daughter, intermeddled with the estate, and instructed Watson to perform further services as a solicitor in respect of the administration of it, and under this retainer Watson continued to perform services, which were for the benefit of the estate, until June, 1882.

On the 10th of June, 1882, the applicant, Robert Phillips, gave notice to Watson revoking his authority to act as solicitor in respect of the estate, and on the 17th of August, 1882, letters of administration de bonis non were granted to Robert Phillips.

In January, 1886, Robert Phillips obtained an order for the delivery of Watson's bills of costs against the estate, and upon taxation the master allowed and taxed the items in respect of the work done between the 12th of December, 1879, when Catherine Noyes died, and the 17th of August, 1882, when letters of administration de bonis non were granted to the applicant, and Field, J., in chambers refused to direct a review of that taxation.

Robert Phillips appealed from the decision of Field, J.

The taxation was objected to in respect of a great number of items of work done before the death of Catherine Noyes, but as the discussion of those objections involved no question of principle, it is unnecessary for the purposes of this report to state the facts or arguments, or the judgment of the Court, with respect to them.

H. F. Dickens, for the applicant. It is not disputed that the estate of Harriett Cross would be bound in respect of the solicitor's charges for work done between her death and the death of Catherine Noyes, if the work was done for the benefit of the estate; nor is it disputed that the liability would pass to Robert Phillips as administrator de bonis non: *Ex parte Watson.* (1) But the estate is not bound in respect of the items of work done during the period between the death of Catherine Noyes and the grant of letters of administration to the applicant. The con-

(1) 53 L. J. (Ch.) 305.

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ditions necessary to bind the estate were not fulfilled. It must be shewn that the work was done upon the order of some person who afterwards became clothed with authority to represent the estate and who then ratified the contract, and that the services were in fact for the benefit of the estate. The ratification then relates back to the contract, and this applies to ratification by an administrator, whose title to the property of the deceased only commences with the grant of letters of administration: *Foster* v. *Bates*. (1) Euston was a mere stranger, and there has been no ratification or adoption of his contract with Watson by the applicant who subsequently obtained administration.

Crump, Q.C., and *J. Parker*, for Watson. Assuming, for the purposes of the argument on this point, that the agreement of the 7th of August, 1877, had come to an end when Catherine Noyes died, it is contended that Harriett Cross' estate was liable in respect of the services rendered by Watson on the order of Easton. The true principle is that where services are rendered before an administrator is appointed, and those services are for the benefit of the estate, the estate, having received the benefit, is bound in the hands of the administrator. The test is whether the estate has got the benefit of the services. If Easton in intermeddling was an executor de son tort he could give Watson an authority which would bind the subsequent administrator.

H. F. Dickens, in reply, cited *Welshman* v. *Sturgess*. (2)

A. L. SMITH, J. As to the work done by Watson during the period between the 12th of December, 1879, and the 17th of August, 1882, I am of opinion that at the time of Catherine Noyes' death the employment of Watson under the agreement of August, 1877, had come to an end. From the 12th of December, 1879, when Ann Phillips and Catherine Noyes had both died, there was no administrator or administratrix of the estate in existence until the 17th of August, 1882, when letters of administration were granted to Robert Phillips. Between these dates Easton, a mere stranger, authorized Watson to perform work and other services for the estate. What authority had Easton to do that? Watson was not doing the work under the prior authority,

(1) 12 M. & W. 226. (2) 13 Q. B. 552.

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because that authority no longer existed. Easton never became administrator and had no authority to bind the estate. The orders given by Easton were never ratified by any person having authority to bind the estate. On the contrary, the evidence is that Robert Phillips in January, 1882, expressly repudiated and revoked Watson's authority. I am of opinion that Watson in order to support his claim against the estate in respect of work done during the period in question is bound to shew, not only that the services he rendered were for the benefit of the estate, but that those services were rendered upon the order of somebody who had power to bind the estate, and this he has utterly failed to shew. I agree that a person cannot bind an estate to pay for services rendered to it by him, unless he shews that some contractual relation in respect of those services existed between himself and some person having authority to bind the estate, or who subsequently obtained that authority. Here there has been an utter failure to shew any contractual relation between Watson and any person who could bind the estate. Having failed to shew that, he has failed to shew that he is entitled to any costs against the estate for work done during the period.

WILLS, J. I am of the same opinion. As to the items for work done by Watson during the period between the death of Harriett Cross and the death of Catherine Noyes, that work was done on the order of Ann Phillips and Catherine Noyes and was for the benefit of the estate. It seems to be a principle of law that where work is done on the credit of the estate by the order of one who afterwards obtains administration and ratifies the contract, the estate is bound if the work done is for the benefit of the estate. The essential conditions are that there should be a contract with some person professing to act for the estate, that the contract should be for the benefit of the estate, and that the person in question should afterwards become administrator and should after being so appointed have ratified the contract. Under those circumstances the case comes within the principle of law that a subsequent ratification of a contract by a person with authority to ratify it relates back to and supports the contract.

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The important question raised is: whether Watson can recover against the estate his charges for work done after the death of Catherine Noyes. It was first suggested that he could do so, because the applicant, Robert Phillips, was a party to the agreement of August, 1877, sanctioned the expenses which were incurred under it, and, having afterwards become administrator, could not escape from it. I am of opinion that upon the appointment of Ann Phillips and Catherine Noyes as administratices, any authority to Watson given by the agreement of the 7th of August, 1877, to do work as for Robert Phillips came to an end, and that it was not revived by the death of the surviving administratrix, and that consequently the work done after the death of Catherine Noyes cannot be considered as authorized by Robert Phillips on account of his having been a party to that agreement. That work was done under an agreement made by Watson with a person who did not represent the estate and had no power to bind it, and that agreement must have come to an end when personal representatives of the deceased were appointed, unless that person had professed to make the contract on behalf of the estate, that is to say, on behalf of whoever should be appointed administrator, and (the contract being in fact for the benefit of the estate) the administrator after his appointment had ratified it. There is no pretence for saying that anyone except Robert Phillips had any authority to bind the estate after the death of Catherine Noyes, and Robert Phillips, both before and after his appointment as administrator, repudiated, instead of adopting, the proceedings of Easton. I am of opinion, therefore, that the agreement made with Easton did not bind the estate. I agree with the judgment of my brother A. L. Smith. The items in Watson's bill in respect of work done between the 12th of December, 1879, and the 17th of August, 1882, must therefore come off.

Appeal allowed.

Solicitors for applicant: *Smiles, Binyon, & Ollard, for G. H. Page, Hay.*

Solicitor for respondent: *T. R. Watson.*

W. A.

[IN THE COURT OF APPEAL.]

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Nov. 15.

STEPHENS *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Carrier—Receiving-Office—Loss of Goods—Felonious Act of Servant—Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *ss.* 5, 8.

A parcel of silk was delivered at a receiving office for transmission to a station on the defendants' railway. No declaration of value was made at the time of delivery. The place where the goods were delivered was stated in the published time tables of the defendants to be a receiving-office for parcels and goods intended for carriage by the defendants. The goods were collected in due course by the defendants and taken to one of their stations; while there they were obtained by a person in the employ of the proprietor of the receiving-office, by means of a forged order, and were stolen:—

Held, that the defendants were not protected by the provisions of the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), as the loss had arisen from the felonious act of a person who was a servant of the defendants within the meaning of s. 8 of that Act.

APPEAL from the judgment of Grantham, J., at the trial of the cause without a jury.

The action was for the loss of goods received by the defendants as carriers. It appeared that an agent of the plaintiff in London was desirous of consigning to him at Gillingham, in Dorsetshire, two bales of silk. For this purpose the goods were taken to a receiving-office in the city of London, called the "Four Swans," of which one Collinson was the proprietor, and were left there for delivery to the defendants, Gillingham being a station on their line. A booking-fee of twopence per parcel was paid, but no declaration of value was made, and no freight or extra freight by way of insurance was paid. The goods remained at the receiving office till, in the ordinary course of business, a van of the defendants called there, when they were delivered to the carman and taken to the Nine Elms station. While the goods were there Leonard Collinson, a son of the proprietor of the receiving-office, applied at the Nine Elms station to stop them, and by means of a forged order written on one of the bill-heads of the office he obtained possession of and stole the goods. Leonard Collinson was in the employ of his father, but was not the person

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who had received the goods when they were left at the office. The "Four Swans" appeared in the published time tables of the defendants as a receiving-office for goods and parcels intended for carriage on the London and South Western Railway, and it was also a receiving office for several other railways and for some carriers. The plaintiff having brought an action to recover the value of the goods stolen, the learned judge held that Leonard Collinson was a servant of the defendants within the meaning of s. 8 of the Carriers' Act (1), and that they were liable for his felonious act, and he gave judgment for the plaintiff. The defendants appealed.

Murphy, Q.C., and *H. Avory*, for the defendants. The elder Collinson was carrying on an independent business: he made the contract, and until delivery to the defendants he was liable for the goods. The notice merely indicates that the carts will call at that place to receive goods for the company. In the case of competitive traffic, where the goods might go by either of two lines, he could not be said to be the servant of one more than of the other. Further he had no authority to receive articles as to which a declaration ought to have been made and cannot be looked on as the servant of the company in respect of such goods. To constitute a person a servant of a carrier he must either be actually in the employment of the carrier or doing work which the carrier has contracted to do. This case is distinguishable from *Machu* v. *London and South Western Ry. Co.* (2) for there the servant of the sub-contractor was actually engaged in carrying out the transit of the goods. That case did not decide that

(1) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 5, enacts that "for the purposes of this Act every office, warehouse, of receiving-house which shall be used or appointed by any mail contractor or stage-coach proprietor or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse, or office of such mail contractor, stage-coach proprietor, or other common carrier. . . ."

Sect. 8 enacts that "Nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ. . . ."

(2) 2 Ex. 415.

the servant of the sub-contractor was the defendants' servant for all purposes, but only while he was carrying out the carrier's contract for him. If the decision went beyond that it went beyond the necessities of the case. Here the part of the contract which Collinson and his servants had to perform was the acceptance of the goods and delivery of them to the defendants. When that was done the relation of master and servant, if it ever existed, came to an end, and the act of the younger Collinson in stealing the goods was the act of a stranger for which the defendants are not liable.

Waddy, Q.C., and *R. V. Williams* (*W. C. Ryde*, with them), for the plaintiff, were not called on.

LORD ESHER, M.R. I think it is perfectly clear that we cannot overrule this judgment.

The case, no doubt, is one of great importance between railway companies and the public. These receiving-houses are the common mode by which goods in large towns are now delivered to railways. The business of a railway company is to induce as many people as possible to send goods for carriage, and therefore the first thing they do is to make the sending of goods easy so as to induce the public to send more goods. They do that by pointing out to the public certain places in convenient localities as receiving-houses. A priori, one would have said that the ordinary meaning of that would be that the goods were to be received by the company at those houses. But however that may be, the Carriers' Act deals with this very matter. It seems to me that the 5th section of that Act was passed in order to meet the case where persons employed in receiving goods for the company are not strictly speaking the servants of the company; but for a particular purpose, and for that only, the legislature desired to bring them into that category. The Act says that for certain goods the carrier shall not be liable, unless the person who delivers them declares their value. That is in relief of the carrier, but then it is pointed out that he ought to be answerable for the honesty of the people he employs, and so in case of dishonesty on their part, the liability of the carrier as a common carrier is to be restored. In the 8th section a number of persons

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are named, book-keepers and others, and lastly "servants." Now by the 5th section, every office, warehouse, or receiving-house, used or appointed by a common carrier, was to be deemed and taken to be the receiving-house, warehouse, or office of such carrier, so when a railway company give notice to the public that a certain place is a receiving-office, that receiving-office must be considered as if it were part of the railway system. In other words, where goods are delivered to a receiving-office pointed out by the railway company, it is just the same as if they were delivered to the company. Now, that being so, the Court in *Machu* v. *London and South Western Ry. Co.* (1) had to consider, looking at both these sections, what was meant by the word "servant," and it was held that the word was not confined to a servant in the strict sense of the word, but included a person employed by the railway company, not directly as their servant, but because they employed his employer to do work for them. If that is the correct meaning of the word in s. 8, it concludes this case, as it is not disputed that the railway company appointed the "Four Swans" as a receiving-office, and actually sent their carts and wagons to take away the parcels left by the public for carriage on their railway. The difficulty which was suggested, that there might be two railways by either of which the goods might be sent, is met by the judgment in *Syms* v. *Chaplin*. (2) It may be that if goods are delivered under such conditions to a person who was employed by both companies without any intimation by which railway they are to go, they are not received for either of them until he makes up his mind and destines them to go by one of the railways, but from that time the goods would be received and held by him for that railway.

I think, therefore, it is quite clear that the judgment was right, and this appeal must be dismissed.

LINDLEY, L.J. This is an action brought against the London and South Western Railway Company for the loss of a parcel of silk. The parcel of silk had been left at the "Four Swans," which was one of the receiving-houses appointed by the defendants for the reception of parcels to be carried by them. That fact is

(1) 2 Ex. 415. (2) 5 Ad. & E. 634.

shewn by their own time tables. The parcel was not lost there. The parcel, it seems, was taken by one of the collecting vans of the railway company to their terminal goods station at Vauxhall, and there the son of the proprietor of the receiving-house got it by means of a forged order. To use a common expression he stole it by means of a forged order.

Now the question is whether the railway company is liable for the loss of the parcel under these circumstances. That depends upon the fact which I have already mentioned, and the true interpretation of the 5th and 8th sections of the Carriers' Act, and the interpretation which has been put upon them in *Machu* v. *London and South Western Ry. Co.* (1) The cases, as has been pointed out already, are not quite on all fours, because in the other case the servant who stole the goods was actually employed to carry them for the railway company when he stole them. In this case young Collinson, who stole these things, was not, when he stole them, acting for or on behalf of the company, or transacting any of the business of the company at all, he stole them just as any other servant might who stole them whilst not acting for the company.

At first sight there seems a little difficulty in saying that young Collinson was such a person as is mentioned in s. 8, but when you couple s. 8 with s. 5, a good deal of light is thrown upon it, and when in addition you look at the reasoning of the Court in *Machu* v. *London and South Western Ry. Co.* (1), it appears to me it is quite impossible to say that this case is not brought within the 8th section. Baron Rolfe's judgment is extremely instructive, and shews the kind of mischief which was sought to be guarded against by this section of the Carriers' Act. Looking at his reasoning, it appears to me impossible to say that this was not such a felonious act as makes the railway company responsible.

It appears to me therefore that the judgment appealed from was right, and that the appeal must be dismissed.

LOPES, L.J. I am of opinion, too, that this appeal ought to be dismissed.

(1) 2 Ex. 415.

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The question is: Was the young man who stole these goods a servant of the defendants—not in the ordinary sense of the word, but a servant within the meaning of the Carriers' Act? Now, the "Four Swans" is the place where the goods in question were deposited, and I take it there cannot be the smallest question, having regard to the notice which the company themselves published, that the "Four Swans" was a receiving-house appointed or used by them. If that is so, what is the position of a receiving-house?

It becomes very important to look at the 5th section of the Carriers' Act, and my interpretation of that section is this—that a receiving-office, appointed and used as this was by a company, is practically the same as the booking-office at their station, and when so used and appointed by the company for goods to be conveyed by them, I am clearly of opinion that their liability commences from the time when the goods are so deposited at that receiving-house. That being so, then the question arises—Was this young man a servant within the meaning of the Act of Parliament.

Now the case of *Machu* v. *London and South Western Ry. Co.* (1) appears to me beyond all doubt to establish that every person who, directly or indirectly, is employed by a company as a carrier to do that which they have contracted to do by themselves or by others under them, is a servant. Now, if that is correct, it is perfectly clear that this young man must be a servant within the meaning of that Act of Parliament, because, as I have said, in my opinion the liability commences from the moment that the goods are deposited at that receiving-office, and it would be impossible to say that he was not employed by them.

Then the further point was taken in this case that did not arise in the case of *Machu* v. *London and South Western Ry. Co.* (1) even if he was a servant, that when these goods left the "Four Swans," the receiving-office, then the contract with the company was completed, and although he might have been a servant before, he ceased at that time to be a servant. It appears to me a point was put by the Master of the Rolls which completely answers that suggestion. It appears to me it can hardly be said

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that, if a porter, after his day's work is done, and he goes home at night, having previously learned where valuable goods are deposited, returns to the station and steals them, he would not be a servant within the meaning of the Act of Parliament. That would be entirely opposed, in my opinion, to the meaning and spirit of the Act of Parliament, and is a contention that cannot be possibly maintained.

I think this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Gasquet & Metcalfe, for Bell & Freame, Gillingham.*

Solicitors for defendants: *Bircham & Co.*

A. M.

[IN THE COURT OF APPEAL.]

Oct. 28; *Nov.* 10, 11, 23.

LUCAS *v.* HARRIS AND ANOTHER.

Practice — Execution Creditor — Sequestration — Appointment of Receiver — Indian Officer's Pension — Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 141.

The pension of an officer of Her Majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve.

Held, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that an order appointing a receiver of such pensions was bad.

Birch v. *Birch* (8 P. D. 163) approved; *Dent* v. *Dent* (Law Rep. 1 P. & M. 366) distinguished.

MOTION by way of appeal from an order of Grantham, J., at chambers, appointing a receiver of the pensions of the defendants. The defendants were sued in separate actions (which had been consolidated by order) upon an indemnity, and at the trial the plaintiff obtained a verdict and judgment for 2000*l.* and costs. On the 23rd of September, 1886, the plaintiff moved ex parte at chambers for the appointment of a receiver of the pensions of the defendants, and Grantham, J., made the order in the terms of the motion. On the 27th of September, the defendants took out a summons to rescind the previous order, which summons was referred by Grantham, J., to the Court.

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The defendants, who were respectively a retired general and a retired colonel of Her Majesty's Indian army, were in receipt of pensions conferred upon them at the time of their retirement, and it was admitted upon the affidavits that the pensions had been granted to them solely in respect of their past services, and that they were not in the nature of half-pay; and that the defendants were absolutely on the retired list, and could never be called upon to go again upon the active list, so that no portion of their pensions was required to keep up their position as officers of the army.

By s. 11 of the Pensions Act, 1871 (Indian Act, No. xxiii.): "No pension granted or continued by Government . . . , on account of past services . . . . and no money due or to become due on account of any such pension shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

By s. 12 of the same Act: "All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension . . . . mentioned in s. 11, in respect of any money not payable at or before the making thereof, on account of any such pension . . . . or for giving or assigning any future interest therein, are null and void."

By s. 141 of the Army Act, 1881 (44 & 45 Vict. c. 58): "Every assignment of, and every charge on, and every agreement to assign or charge any . . . . pension payable to any officer or soldier of any of Her Majesty's forces, or any pension payable to any such officer . . . ., or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the person entitled thereto, or as may be authorized by any Act for the time being in force, be void."

Foà, for the defendants. This is a proceeding in the nature of a sequestration, though in form an application for the appointment of a receiver. The assignability of a pension is the sole test of its liability to sequestration: *Birch* v. *Birch*. (1) It is

(1) 8 P. D. 163.

true that in *Willcock* v. *Terrell* (1) stress is laid on the distinction between pensions granted wholly in respect of past services, and those where the pensioner remained liable to be called on for future service; but assignability as a test is alluded to in the judgment, and the pension was held to be liable to attachment because, as it had been given entirely for past services, there was no restraint on its assignability. These pensions are now made non-assignable by the Indian Pensions Act, 1871, s. 12, and also by s. 141 of the Army Act, 1881, which applies to the extent of preventing their being attached in England; and the effect of these enactments, as was pointed out by Sir J. Hannen in *Birch* v. *Birch* (2), is to place all pensions on the same footing as half-pay, which, being an allowance made in consideration of the recipient remaining liable to be called upon for future service, is not liable to attachment.

Charles, Q.C., and *Blake Odgers*, for the plaintiff. This is not a case of sequestration, but an application to the equitable jurisdiction of the Court under s. 25, sub-s. 8, of the Judicature Act, 1873; and the Court will appoint a receiver whenever it is just and convenient to do so: *Gwatkin* v. *Bird.* (3)

The fund is one of which the creditor can obtain the benefit, the pension having been given for past services only. There is a broad distinction between the two classes of pensions, and this was always held to be the test of their assignability by the recipient: *Wells* v. *Foster.* (4) This distinction has always been regarded, and a pension given solely in respect of past services is liable to sequestration; this is the test laid down by Lord Penzance in *Dent* v. *Dent* (5), which is an express authority in the plaintiff's favour. The ratio decidendi was the same in *Willcock* v. *Terrell* (1), where nothing is said as to assignability being the exclusive test. The pension is not exempt from indirect assignment, for it would vest in a trustee in bankruptcy as "property" of the bankrupt: *Ex parte Huggins.* (6)

This case is not within s. 12 of the Indian Act of 1871. Comparing that section with s. 11 of the same Act, it is clear

(1) 3 Ex. D. 323.
(2) 8 P. D. 163.
(3) 52 L. J. (Q.B.) 263.
(4) 8 M. & W. 149.
(5) Law Rep. 1 P. & M. 366.
(6) 21 Ch. D. 85.

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that it only affects assignments made by the person entitled to the pension. Even if these pensions fall within s. 12 of the Indian Act in the sense that an assignment of them cannot be made by the defendants, they are not within s. 141 of the Army Act, 1881, for the defendants are not persons subject to military law, and the application of the Army Act, 1881, is limited to such persons by s. 2, sub-s. 2, of the Army Act, 1886.

Foà, in reply. Sect. 25, sub-s. 8, of the Judicature Act, 1873, does not authorize the Court, by the exercise of its discretion, to override the plain meaning of the statutes. The Army Act, 1881, is not by the Act of 1886 made applicable "only" to persons subject to military law; it affects those persons among others. *Dent* v. *Dent* (1) was decided at a time when there was no restraint imposed by statute on the assignability of these pensions; and the decision in *Birch* v. *Birch* (2), which was subsequent to the imposition of the statutory restraint, is now binding, so as to prevent their compulsory assignment.

DENMAN, J. I am of opinion that the order of my Brother Grantham was right, and that he had full jurisdiction to appoint a receiver to receive the pensions of the defendants. The law has been very clearly laid down by Lord Penzance in his considered judgment in *Dent* v. *Dent*. (1) That was an application for the sequestration of moneys which were exactly upon the same footing, unless subsequent legislation has made any difference, as the moneys here sought to be placed in the hands of a receiver. The defendant in that case, or the person on whom the order was made, was an officer in the Indian navy, who had retired upon a full pension, and it is admitted that he was exactly in the same position as the present defendants.

Now the affidavit in this case states in the strongest possible way what their position is; and it is that they are entitled to receive, through the medium of the Secretary of State for India, every quarter a sum of 148*l.* or thereabouts, which is their full pay; that they are absolutely on the retired list and will never be called upon to go again on the active list, so that no portion of their pay is required to keep up their position as officers in

(1) Law Rep. 1 P. & M. 366. (2) 8 P. D. 163.

Her Majesty's army. In the case of *Dent* v. *Dent* (1) the defendant was an officer in the navy, but beyond that there is no distinction, because they were officers in exactly the same position; and in that case Lord Penzance decided that the test of the liability of a pension to sequestration was its having been granted solely in respect of past services. But it is contended that subsequent legislation and the case of *Birch* v. *Birch* (2) have made a difference, and that we ought to hold that no sequestration can be allowed under such circumstances as the present. Now, first, with regard to subsequent legislation. Reading in the section of the Indian Act which has been referred to, it is quite clear to my mind that that does not apply to the case, because it simply refers to assignments, agreements, and other things which are made by the person entitled to the pension. This is not that case; it is not an assignment of that sort. Then again s. 141 of the Army Act, 1881, is upon the face of it, it seems to me, applicable to assignments made by the person who has the right to assign, or would have had a right to assign except for this enactment. Then came the Act of 1886, and I will assume for the present that that leaves untouched s. 141.

A somewhat similar case at a later stage came before the present judge of the Probate and Divorce Division, and he certainly does appear upon the argument that was addressed to him to have drawn an inference that because there was an Act of Parliament applicable to such pensions which made an assignment of those pensions, and agreements to assign or to charge them, void and illegal, no sequestration of them could be made—that no effect could be given to a judgment against officers entitled to these pensions, even when they were entitled to receive those pensions, no assignment of them having been made within the meaning of those enactments. I cannot think that decision can stand with that of *Dent* v. *Dent* (1), and we have, I think, practically to elect between the two; and I must say I entirely agree with the good sense of the former. A man may not charge the pension that is granted to him, because it is not right that where the Crown is intending to reward a person for his services such pensions should be pledged beforehand; if that were allowed,

(1) Law Rep. 1 P. & M. 366. (2) 8 P. D. 163.

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the pension would not really be for the benefit of the person who had served his country; but I do not think it reasonable that, when a man is entitled to such a pension and has incurred debts which he is unable to pay, there should not be a power on the part of a creditor to have a receiver appointed in order that the moneys may be received by that receiver, and dealt with by the Court according to justice. I think that before the Judicature Act the Court would have had power to appoint a receiver to deal with this property, and that that power is not taken away by any of the subsequent enactments. It would require strong words in my judgment to take away such a reasonable provision of the law as that which is to be found in the decision of *Dent* v. *Dent* (1). That case was in accordance with previous decisions, including that in *Willcock* v. *Terrell.* (2) At first sight it was supposed in the argument that the test put in the last-named case was the assignability of the pension, but that does not appear upon consideration to be the case: the Court of Appeal really did apply the very same test which Lord Penzance had previously applied in *Dent* v *Dent.* (1) In my opinion the learned judge was right, and his order ought to stand.

MANISTY, J., concurred.

STEPHEN, J. I am of the same opinion, and I will say one word in addition to what has been said by my learned Brother. It seems to me for the reasons already given by my Brother Denman, that the whole question in this case is whether the proper test as to pensions being attachable is laid down by Lord Penzance or by Sir James Hannen. I think the proper test is laid down by Lord Penzance. I can understand its being perfectly plain good common sense that, if you have received a pension in respect of past services, that pension shall be made liable to your debts, because it is in point of fact part of your property; but if you receive a retaining fee for future services that shall not be liable in respect of your debts. I fully understand that distinction. But I do not understand the distinction that is proposed to be substituted for it, and to which countenance

(1) Law Rep. 1 P. & M. 366. (2) 3 Ex. D. 323.

is lent by the decision of *Birch* v. *Birch* (1), namely, that if you can assign your pension it may be taken in execution. Of course I can very well understand, and indeed the fact is, that many pensions are not assignable; nevertheless the persons receiving them have just as good rights as if they were assignable.

Then with regard to the appointment of the receiver, I do not see anything that we need trouble ourselves about. The 25th section of the Judicature Act gives the Court power, which before that time could be exercised only by the Court of Chancery, and it gives it in somewhat wider terms it may be than the power as exercised by the Court of Chancery, but I do not see that that has anything to do with the matter. It does not enable us to make available for the payment of debts any funds which were not before available; but I think that quite irrespective of that question these funds were available for the payment of debts, and therefore that my Brother Grantham's decision was right.

Order affirmed.

W. J. B.

The defendants appealed.

Nov. 10, 11. *Foà*, for the appellants, and *Lumley Smith, Q.C.*, and *Blake Odgers*, for the respondent, argued as in the Court below.

Cur. adv. vult.

Nov. 23. The following judgments were delivered:—

LINDLEY, L.J. The plaintiff in this case having obtained judgment for 2000*l.* against the defendants, and being unable to obtain payment by a fi. fa., applied for and obtained from Grantham, J., sitting in chambers, an order appointing a receiver of certain pensions payable to the defendants by the Indian Government. This order appears to have been made during the vacation upon an ex parte application. Shortly after the order was made the defendants took out a summons to have the order discharged. This summons was adjourned to the Divisional Court, and was heard by it, and was dismissed with costs. From this order the defendants have appealed.

(1) 8 P. D. 163.

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No explanation has been given of the reasons which induced the learned judge to make an order for a receiver on an ex parte application. But the appellant did not rely on any irregularity or impropriety in this respect, and I notice the point only because ex parte applications for a receiver ought not to be granted, even after judgment, except in case of emergency, and it is desirable that this rule should always be borne in mind, and not be lightly departed from.

The real ground of the appeal is that the pensions sought to be affected by the order cannot be taken in execution by means of a receiver, or in any other way. This depends on the nature of the pensions, and on the true construction of s. 141 of the Army Act, 1881. Both the defendants are retired staff officers of the Indian army, and are entitled to pensions under the Indian Pensions Act, 1871. The pensions are payable by the Secretary of State for India out of funds provided by the Indian government. It has, moreover, been ascertained, and it is now admitted, that both the defendants are by virtue of their commissions, or otherwise, legally entitled to the style and rank of officers of Her Majesty's forces. In other words both defendants are "officers" as defined in s. 190, sub-s. 4, of the Army Act, 1881.

By the Indian Pensions Act, 1871, ss. 11 and 12, the pensions of the defendants are expressly made not assignable; nor can they be in any manner taken in execution in India. The Indian Act does not of course say that they cannot be attached or taken in execution out of India; the Indian government only legislating for its own dominions. But it is obvious that the whole object of the Indian legislature, which has authorized the payment of these pensions, was to prevent them from being dealt with by, or taken from, the officers to whom they were granted; and it is also obvious that this object would be defeated if the order appealed from were to stand, and were to be recognized and carried out by the Secretary of State for India. These Indian enactments alone may not of themselves be sufficient to render these pensions incapable of being attached, sequestered, or otherwise reached by legal process in this country. But the Indian Acts create the pensions and determine their nature, and the Courts of this country ought not, I think, to make an order

which, if operative, will defeat the objects of the Indian legislature, unless the law of this country is such as to compel the Courts so to do.

I proceed now to consider the Army Act, 1881, and the authorities relating to the assignment of pensions, and to their liability to be taken in execution. The Army Act, 1881 (continued and amended by the Army Annual Act, 1886), applies with certain modifications to India as well as to this country (see part v.), Sect. 141 applies to pensions, and is as follows:—[The Lord Justice read the section.]

The word "officer" includes retired officer (see s. 190, sub-s. 4), so that the section clearly includes pensions payable to them. The section makes void all assignments of and charges on, and all agreements to assign or charge, such pensions. It does not in terms apply to executions or attachments, but officers' pensions are not debts attachable in the ordinary way: see *Innes* v. *East India Co.* (1); *Ex parte Hawker* (2); and there is no method of taking such pensions in execution unless it be by means of a sequestration or a receiver. A sequestration, unless followed by an order for a receiver, is practically of no use, as may be seen from *Willcock* v. *Terrell* (3); and the order with which the Court has to deal is an order for a receiver. In considering whether a receiver of a retired officer's pension ought to be appointed, not only the language but the object of s. 141 of the Army Act, 1881, must be looked to; and the object of the section would, in my opinion, be defeated, and not advanced, if a receiver were appointed. The reasoning on which *Gathercole* v. *Smith* (4) was decided is quite as applicable to this statute as to the statute with which the Court had there to deal, although the language of the two statutes is not quite the same.

Turning to the authorities, they shew that where the pension of a retired officer, whether naval, military, or civil, is not made inalienable by statute, it is alienable, and a receiver of what has already become payable may be properly appointed: *Willcock* v. *Terrell* (3), and *Dent* v. *Dent* (5); see also *Spooner* v. *Payne* (6),

(1) 17 C. B. 351.
(2) Law Rep. 7 Ch. 214.
(3) 3 Ex. D. 323.
(4) 17 Ch. D. 1.
(5) Law Rep. 1 P. & D. 366.
(6) 1 De G. M. & G. 383.

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Carew v. *Cooper* (1), and *Heald* v. *Hay*. (2) A distinction has also been drawn between half-pay and a retiring pension. The first has been decided to be inalienable even at common law, and therefore not seizable: *Flarty* v. *Odlum* (3); *Lidderdale* v. *Duke of Montrose* (4); *McCarthy* v. *Goold* (5); *Wells* v. *Foster* (6); whilst, as already stated, the last has been held to be alienable, and therefore seizable, where alienation is not prohibited. The distinction drawn between half-pay and a retiring pension turns on the fact, that, speaking generally and without reference to any particular statute, the first is not alienable whilst the second is. See the judgment of Parke, B., in *Wells* v. *Foster*. (6) But if by any particular statute a retiring pension is inalienable, there is no authority to shew that it can be taken in execution; and the reason for the difference between half-pay and retired pay as regards liability to be taken in execution ceases to exist. The case of *Birch* v. *Birch* (7) was decided on this principle, and turned on s. 141 of the Army Act, 1881.

Reliance was placed by counsel for the plaintiff and by the Court below on *Dent* v. *Dent* (8), which was thought to be opposed to *Birch* v. *Birch* (7); but the pension there in question was an Indian navy retired pension, and was not apparently subject to any Indian or English statute which made it inalienable. At all events, if it was in truth inalienable by statute, that circumstance does not appear from the report, and was not present to the mind of the Court. The case of *Dent* v. *Dent* (8) therefore cannot be regarded as opposed to *Birch* v. *Birch* (7), nor to any other decision in the books.

It appears to me, therefore, both on principle and on authority, that the pensions of these defendants, being made inalienable by statute, are not liable to be taken in execution either through an order for a receiver, or in any other way. The Court was asked to appoint a receiver of the sums which became due and payable in October last. But that would not be right, for they would have been paid to the defendants in the ordinary course before

(1) 4 Giff. 619.
(2) 3 Giff. 467.
(3) 3 T. R. 681.
(4) 4 T. R. 248.
(5) 1 Ba. & Be. 387.
(6) 8 M. & W. 149.
(7) 8 P. D. 163.
(8) Law Rep. 1 P. & D. 366.

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now if it had not been for the order under appeal, which order ought never to have been made. The pensions being inalienable by statute, the Court ought not to restrain the defendants from receiving them, and thereby do indirectly what the statute prohibits it from doing directly.

For the above reasons I am of opinion that the order of the 23rd of September, 1886, appointing a receiver of these pensions ought not to have been made, and that the Divisional Court ought to have discharged it, and that it ought to be discharged now, and that the appeal ought to be allowed with costs.

LOPES, L.J. The plaintiff had obtained judgment against the defendants, two retired officers of the Indian army, and had obtained an order for a receiver to enable him to receive their pensions in satisfaction of his debt.

The Divisional Court upheld this order, against which the defendants appealed.

It is obvious from s. 141 of the Army Act, 1881, that pensions, though for past services, are inalienable by the voluntary act of those entitled to them. The question is, whether persons entitled to them can be deprived of them by process of law. On the construction of s. 141 I am clearly of opinion that the legislature intended to make pensions for past services not only inalienable by the persons to whom they are granted, but absolutely inalienable except in the manner provided in that section. It is to be observed that the section does not speak only of an "assignment," but uses the expression "charge on," and I think by the latter term intended to cover judgment obtained against the party entitled to the pension, and the consequences of such judgment.

It is beyond dispute that the object of the legislature was to secure for officers who had served their country a provision which would keep them from want and would enable them to retain a respectable social position. I do not see how this object could be effected unless those pensions were made absolutely inalienable, preventing not only the person himself assigning his interest in the pension, but also preventing the pension being seized or

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attached under a garnishee order, or by an execution or other process of law. Unless protection is given to this extent the object which the legislature had in view is frustrated, and a strange anomaly would exist. A person with a pension would not be able to utilise his pension to pay a debt beforehand, but immediately his creditor had obtained judgment might be deprived of his pension by attachment, equitable execution, or some other legal process. It is impossible to suppose that the legislature could have intended such an anomaly. The words of s. 141 are not so clear as they might be, but in my opinion are amply sufficient to indicate that the pensions to which these officers are entitled were intended to be absolutely inalienable. The Court below considered that there was a discrepancy between the cases of *Dent* v. *Dent* (1) and *Birch* v. *Birch* (2), and acted upon the authority of the former case.

Dent v. *Dent* (1) was not, but *Birch* v. *Birch* (2) was, a decision upon s. 141 of the Army Act. I think the latter case is a strong authority in favour of the defendants in this case, and is in accordance with what I believe to be the true construction of the Act of Parliament. *Gathercole* v. *Smith* (3) is a decision upon the Incumbents' Registration Act, 1871, and, although the words used in s. 10 of that Act are different from the words used in the Army Act, still the reasoning upon which the Court proceeded is the same as that which has influenced me in the decision at which I have arrived.

I am of opinion, therefore, that the appeal should be allowed.

LORD ESHER, M.R. During the arguments I entertained a strong opinion that the case of *Birch* v. *Birch* (2) laid down the true principle upon which we ought to decide this case, and that in applying that principle it was a necessary implication that a sequestration could not be applied to these pensions. I thought also that if *Birch* v. *Birch* (2) were in conflict with *Dent* v. *Dent* (1) I should prefer the decision in *Birch* v. *Birch*. (2) I am still of that opinion. I entirely agree with the judgments delivered by

(1) Law Rep. 1 P. & M. 366. (2) 8 P. D. 163.
(3) 17 Ch. D. 1.

my Brothers Lindley and Lopes, and I think it better to give no opinion whatever upon the points taken in argument with respect to the effect of the Bankruptcy Act.

Appeal allowed.

Solicitors for the appellants: *Ellis, Munday, & Bartrum.*
Solicitors for the respondents: *Carr & Co.*

W. A.

SETON, LAING & Co. *v.* LAFONE.

Oct. 27; *Nov.* 16.

Trover—Estoppel—Conduct—Representation Proximate Cause of Loss—Negligence—Wharfingers' Warrants.

Goods were in 1875 stored by brokers with wharfingers who issued a warrant stating that this "warrant is the only document issued by us as a legal symbol of these goods," and that after a named date "this warrant alone will be sufficient to obtain delivery."

In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain parties instead of goods to which they were entitled, the defendant not being then aware of this mistake. The warrant had been negotiated and was in January, 1886, in the possession of B. & E. In that month, no rent having been paid since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him as the supposed holder of the warrant and as the person presumedly interested in the goods, that the goods were in hand, that rent was due, and that unless it was paid the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. & E., and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession.

In an action to recover damages for a wrongful conversion of the goods:—

Held, that the defendant was liable, that he was estopped from denying that he had the goods specified in the warrant, for that he had been guilty of negligence in representing to the plaintiff that he had the goods in hand, and that his negligence was the proximate cause of the loss sustained by the plaintiff, who had purchased the warrant in consequence of the statements made by him.

ACTION tried by Denman, J.

The action was brought by the plaintiff, the holder of certain warrants for goods, against the defendant, at whose wharf the goods had been stored, for conversion, and in the alternative for damages for representing that the warrants were the legal symbol of the goods specified in them, and that he held those goods ready

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to deliver in exchange for the warrants, whereby the plaintiff was induced to purchase the warrants.

The material facts and documents are set out in the judgment of Denman, J.

Finlay, Q.C., and *Pyke*, for the plaintiff.

Cock, Q.C. and *Peile*, for the defendant.

Cur adv. vult.

Nov. 16. DENMAN, J. This case came before me and a special jury. It was agreed at the trial that I should take the opinion of the jury upon the question of damages only, and that the question of liability should be disposed of by me or any other Court before which the case might come, with power to decide all questions (except the amount of damages) whether of law or fact, and to draw all reasonable inferences.

The facts proved or admitted at the trial were as follows:— In 1875 twenty-six chests of lac dye were imported from India by one Petrocochino. A firm of Seton, Laing & Co., colonial brokers (in whose service Robinson, the plaintiff, who now sues under the name of Seton, Laing & Co., was then a clerk) acted as brokers in the transaction, and through them the twenty-six chests were stored at Butler's Wharf, where the business of wharfingers was then carried on by a limited company called "Butler's Wharf Company, Limited." This company issued thirteen warrants identical in form, each for two of the twenty-six chests in question. The warrants were in the following form:—"Butler's Wharf Company, Limited. Warrant for two cases of lac dye; imported in the *Hartfell*. Entered by Petrocochino, the 24th of September, 1875. Deliverable to Petrocochino or assigns by indorsement hereon. Rent commences on the 2nd of October, 1875, and all other charges from the date hereof prompt, 3rd of June, 1876." Then followed a list in tabular form of marks, number of wharf, and weight. At the foot was the following note:—"The holder of the weight-note which has been issued for these goods is entitled to this warrant on tendering to the holder thereof the purchase money less the amount of deposit (as specified in the weight note) at any time on or before the day of prompt. Should the delivery of the goods be required before or on the prompt day the

weight note must be deposited at the wharf together with this warrant. After that date this warrant alone will be sufficient to obtain the delivery of them." In the margin there was the following:—"N.B. This warrant is the only document issued by us as a legal symbol of these goods."

The goods were marked D T, which indicated a superior quality of lac dye. The warrants were sent to the then firm of Seton, Laing & Co., in whose employment the plaintiff Robinson then was, and after certain transactions which were not explained, got into the hands of a firm of Batten & Edwards, and were in their possession down to the beginning of January, 1886.

In the meantime the Butler's Wharf Company, Limited, went into liquidation, and the present defendant Lafone was appointed manager on behalf of some mortgagees, and carried on the same business at the same wharf.

On the 10th of April, 1885, the defendant's servants by some mistake had parted with the twenty-six chests to other parties instead of goods to which those parties were entitled; but on the 4th of January, 1886, the defendant, in ignorance of this, wrote as follows to the plaintiff, who at that time had become the owner of the business carried on in 1875 by Seton, Laing & Co., and now carried on the same business in the same name as "Seton, Laing & Co.":—"Messrs. Seton, Laing & Co.,—Gentlemen,—We beg to inform you that we find by our ledgers the undermentioned lac dye to be in hand, in which we believe you are interested, and for which warrants are out. Rent on same to 16th January, 1886, amounts to 41*l.* 17*s.* 6*d.*—This is to give you notice that unless the same is paid within fourteen days the lac dye will be sold to meet such charges." Then followed a description of the twenty-six chests. The plaintiff Robinson received this letter, and sent no answer to it.

On the 12th of January the defendant wrote again to the plaintiff as follows:—"As holders of warrants for lac dye No. $\frac{74864}{74877}$ for which 41*l.* 17*s.* 6*d.* will be due on the 16th inst., please say if you will pay the rent and cancel the warrants, as we cannot allow these goods to be any longer on warrants," and concluded by stating that the dyes would be sold if the plaintiffs declined to pay the rent. The plaintiff did not answer this letter.

On the 23rd of February the plaintiff bought the warrants

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from Messrs. Batten & Edwards for 8*l.* 1*s.* 6*d.*, that is at the rate of one farthing per pound for the lac dye, taking upon himself the charges due, which were 37*l.* 2*s.* At the time of the importation of the lac dye in 1875 the value of lac dye had suddenly fallen, greatly owing to the discovery of a method of dyeing in scarlet by means of aniline dyes, but in 1886 there was evidence which satisfied the jury, and which was hardly contradicted, that the value of lac dye had risen again.

The plaintiff having purchased the warrants in February, applied to the defendant for the goods early in March, and a correspondence took place, the defendant claiming the rent, which he put at 41*l.*, and the plaintiff claiming to inspect the goods before he paid the rent.

In fact the rent had been paid by Petrocochino, or some other party, down to the 4th of January, 1880, which was after the present defendant had assumed the conduct of the business and subsequent to the liquidation of the limited company, so that the claim for rent was in any case in excess of that due upon the goods (37*l.* 2*s.*).

On the 30th of March, 1886, the twenty-six chests were included in a catalogue of goods to be sold by auction. The plaintiff and the defendant both attended the sale. The plaintiff produced the warrants and objected to the sale of the lac dye, but said he would not pay the rent until he had seen the goods. The lac dye was withdrawn from the sale. The same day the defendant, who personally had only discovered the fact since the withdrawal of the goods in the morning, informed the plaintiff that the goods were not in the warehouse, but that they had several months before, viz., in April, 1885, been delivered to some other person by mistake. The plaintiff swore, and I see no reason to disbelieve him, that his reason for not answering the letters of the 4th and 12th of January, 1886, was that he was not then the holder of the warrants, and that he did not know anything about the goods until he received the information contained in the letters of the 4th and 12th of January from the defendant which put him upon inquiry for the warrants, and led him to purchase them.

Upon this state of facts it was contended by the defendant that he was not liable because the goods were not in his possession when first demanded by the plaintiff, having been parted

with in 1885, and also because he was not party to the warrants issued by the Wharf Company, Limited, and had not indorsed them to the plaintiff or at all. The warrants had all been indorsed by Petrocochino, but there was no further indorsement.

I agree with Mr. Cock in thinking that the expressions in the letter of the 12th of January: "As holders of the warrants, &c., please say if you will pay the rent," &c., would not be sufficient to estop the defendant from shewing that the plaintiff was not in fact the holder of the warrants at that time. But the plaintiff in fact became the holder of the warrants, though at a subsequent period, and as such would have been entitled as against Butler's Wharf, Limited, the prompt having long expired, on the mere production of the warrants indorsed as they were by Petrocochino.

The question then arises whether, upon the facts of the case, the plaintiff is entitled to treat the defendant as liable to him under the warrants, the goods having never been in the defendant's possession at any period after the plaintiff's interest in them commenced.

I am of opinion that he is, and that the defendant has so conducted himself as to be estopped from denying his liability.

The defendant, on the 4th of January, writes to Seton, Laing, & Co., not, indeed, knowing that that is the plaintiff, but the fact being so, a business letter referring to the warrants and claiming rent on lac dye in hand, which he threatens to sell if the charges are not paid. That certainly amounts to a statement that the lac dye is in the defendant's possession, and that he claims rent under the warrants referred to.

In the letter of the 12th of January he again refers to the warrants, treating the firm of Seton, Laing, & Co. as the holders, and speaks of the charges which will be due, that is under the warrants, and threatens to sell or destroy the goods if the rent is not paid. This language would certainly induce any reasonable being to suppose that the goods were still in his possession.

I have no doubt whatever, having power to decide questions of fact, and to draw inferences of fact, that the plaintiff was induced by that language to suppose that the goods were still in the warehouse, for the use of which the defendant was claiming rent at the time, and to purchase the warrants in order to enable him to make a profit out of them after paying the rent.

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This being my view of the facts, I am of opinion that the case falls within the principle laid down in the case of *Coventry* v. *Great Eastern Ry. Co.* (1)

In that case the following was the state of things:—The plaintiffs, Messrs. Coventry, who were corn factors, had on the 12th of December made advances to one Bowden, on the faith of a delivery order for wheat signed by Birketts addressed to the Great Eastern Railway, the defendants, directing them to deliver the wheat (150 sacks) in trucks with numbers as per "orders lodged." The defendants accepted that order on the 13th. On the 14th Bowden brought the plaintiffs another delivery order made out on a printed form of the defendants, the Great Eastern Railway Company. The advice-note, which was addressed to Bowden, commenced thus: "Dec. 13th.—The undermentioned grain consigned to you having arrived at this station I will thank you for instructions as to its removal hence as soon as possible, as it remains here to your order, and is now held by the company as warehousemen." There were points of difference between the two documents, that of the 13th mentioning 151 sacks, and the numbers of the trucks not being apparently identical. Bowden filled up this second order with the plaintiffs' name, who thereupon made him a further advance, and the defendants accepted this order also. In January, Bowden having become insolvent, the plaintiffs desiring to sell the wheat were informed by the defendants that there was only one parcel and that they had accepted the second delivery order by mistake. The advice-note of the 13th of December had the words "charges only" written at the top and across it, and it was intended by the defendants to be merely an account of the charges; but at the foot of it were the words: "Please sign the undermentioned order without which the goods cannot be delivered by the Great Eastern Railway Company. Please deliver the above-mentioned goods to Coventry, Sheppard, & Co. or bearer, Bowden & Co.," and it was indorsed "Sheppard & Co."

Pollock, B., who tried the case without a jury, gave judgment for the plaintiffs on the ground that the advice-note of the 13th of December amounted to an admission by the defendants that they held the grain at the disposal of the consignees, and that the

(1) 11 Q. B. D. 776.

plaintiffs were entitled to say that the documents must be taken as representing goods actually in the defendant's possession.

The case came before the Court of Appeal, and it was argued there, as it was here, that the defendants were not estopped from denying that the goods were in their possession because the facts did not bring the case within any of the classes of estoppel defined in the elaborate judgment, to which I was an assenting party, delivered by Lord Esher, when a judge of the Common Pleas, in the case of *Carr* v. *London and North Western Ry. Co.* (1) But the Court of Appeal held that the defendants were liable to make good the advances made by the plaintiffs on the second occasion on one of the grounds of estoppel enumerated in *Carr* v. *London and North Western Ry. Co.* (1), which is thus stated in the judgment, at page 318 of the report: "If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to shew that the state of facts referred to did not exist."

The plaintiff failed in *Carr* v. *London and North Western Ry. Co.* (1), because no negligence was found against the defendants, and also because the plaintiff did not resell in consequence of any negligence alleged, and the only cause of damage to the plaintiff was such resale.

But in *Coventry* v. *Great Eastern Ry. Co.* (2) the Court of Appeal held that the statement in the document of the 13th of December was the proximate and immediate cause of the advance of the money to Bowden, and that there was negligence in the statement contained in that document that the defendants were holding goods which in fact they were not holding, and that such negligence was to the prejudice of the plaintiffs.

In the present case I find that the defendant was negligent in representing to the plaintiff that he had goods in hand to the order of Petrocochino.

It was owing to the negligence of his servants that the goods

(1) Law Rep. 10 C. P. 307. (2) 11 Q. B. D. 776.

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had been disposed of, and I think it would be very unsafe to hold that a warehouseman is not guilty of negligence who, in a document referring to a warrant issued by the person whose business he is carrying on and claiming warehouse rent, asserts that the goods are still in his warehouse a year after they have by mistake been delivered to some one not entitled to them.

I think that the documents of the 4th of January and the 12th of January, referring as they do to the warrants under which the defendant claims rent are in as high a sense as the advice-notes sent by the defendants in *Coventry* v. *Great Eastern Ry. Co.* (1), documents in the course of business which the plaintiff was entitled as against the defendant to act upon, and that he has acted upon them to his own detriment.

The plaintiff purchased the warrants for, as he said, 8*l.* 1*s.* 6*d.* from Batten & Edwards, taking upon himself the liability of the rent.

It may be doubtful whether the real damage which he has incurred ought not to be the limit of the damages to which the plaintiff should be entitled, as suggested in the note to *Duchess of Kingston's Case.* (2) It is difficult to see how this would be larger than the 8*l.* 1*s.* 6*d.* which he paid for the warrants.

But I do not feel myself at liberty to consider this point, inasmuch as it was agreed at the trial that the damages should be assessed upon the basis of the value per pound of the lac dye at the time of action brought.

The jury assessed that amount at 3*d.*, which made the total value of the lac dye 97*l.* 11*s.* 9*d.*, from which the jury deducted 37*l.* 2*s.*, the amount which the plaintiff would have had to pay for rent if the dye had been forthcoming, giving the plaintiff a verdict for 60*l.* 9*s.* 9*d.*

For these reasons I give judgment for the plaintiff for that amount and costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Irvine & Hodges.*

Solicitors for defendant: *West, King, Adams, & Co.*

(1) 11 Q. B. D. 776.

(2) 2 Sm. L. C. 8th ed. p. 912.

R. B. R.

[IN THE COURT OF APPEAL.]

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Dec. 6.

COX, PATTERSON, & CO. *v.* BRUCE & CO.

Ship—Bill of Lading—Quality Marks—Representation—Estoppel—Authority of Master.

A bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision:—"If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks and more marked with another of such marks indicating an inferior quality than stated in the bill of lading:—

Held, on the above facts, that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading.

Grant v. *Norway* (10 C. B. 665) followed.

APPEAL from the judgment of the Queen's Bench Division upon a special case, the facts of which were in substance as follows:—

In September, 1883, 500 bales of jute were shipped by Steel & Co., who were merchants at Calcutta, on board the defendants' ship for carriage to London; of such bales 26 were marked ◇RC◇ 1., 192 were marked ◇RC◇ 2., and 282 were marked ◇RC◇ 3. A bill of lading was signed by the captain, and delivered to the shippers, which, so far as material, was in the following terms:—"Shipped in good order and condition, &c., Five Hundred Bales of Jute, being marked and numbered as per margin . . . . weight, contents, and value unknown." In the margin was the following memorandum:—"If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the

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shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods."

The marks and numbers in the margin were as follows:—

1=26. B/S. 2=251. B/S. 3=223. B/S.

The bill of lading was indorsed by the shippers for valuable consideration to the plaintiffs, to whom the property in the goods thereby passed, and who took the bill of lading without any notice of any incorrectness in the description of the said goods in the bill of lading. The said bill of lading was in the customary form of bills of lading in the jute trade for sailing vessels between Calcutta and the United Kingdom, and that form and no other had been in use since April, 1881, in the said trade, of which the defendants were always since that date and at the time of the shipment in question aware, and they had since April, 1881, always used the same form for their vessels engaged in the said trade. Jute is shipped in various qualities, which are indicated on the bales when packed by letters of the alphabet or by the numbers 1, 2, and 3, No. 1 indicating first quality, No. 2 second quality, and No. 3 third quality. These letters and numbers respectively are termed quality marks. In the said bill of lading the mark was the leading mark borne by each of the 500 bales, and the numbers 1, 2, and 3, were quality marks, and the numbers 26, 251, and 223 indicated the number of bales of each quality shipped. It was admitted that quality marks were used on the goods which were shipped, and that such quality marks were of the same size as the leading marks and contiguous thereto; also that the same quality marks and the same numbers of bales of each such quality mark as appeared in the said bill of lading were inserted in the shipping notes, and that the goods actually shipped were accepted by the mate of the said vessel, and that the bill of lading was signed by the master in conformity with the shipping notes.

On the arrival of the ship in London and discharge of the cargo there were delivered to the plaintiffs 500 bales of jute, but there were 59 bales less of No. 2 quality and 59 more of No. 3

quality than appeared from the bill of lading. It was admitted, however, that the defendants delivered to the plaintiffs the same 500 bales which they received from the shippers. The difference in value to the plaintiffs between the bales delivered and those described in the bill of lading was to be taken to be 10*l.*

The question for the Court was whether the defendants were liable to the plaintiffs for the non-delivery of goods of the quality and bearing the quality marks stated in the said bill of lading.

The Queen's Bench Division gave judgment for the defendants, against which the plaintiffs appealed.

Bigham, Q.C., and *Gorell Barnes*, for the plaintiffs. Upon the true construction of the bill of lading there was a breach of contract by the defendants. The reasonable interpretation of the memorandum in the margin is that the intention was that the master was to satisfy himself of the correctness of the quality marks stated in the shipping notes, and, on being so satisfied, was to sign bills of lading accordingly, and that the shipowners were to be responsible for the delivery of bales bearing the quality marks so indicated in the bill of lading. If the memorandum is construed as only applying when the quality marks are correctly inserted by the shippers in the shipping notes, then it will have no substantial operation at all, because of course the shipowners are responsible for the delivery of the bales shipped.

Secondly, even if there was no breach of contract as between shippers and shipowners, the bill of lading amounts to a representation to an indorsee for value without notice that bales bearing the quality marks mentioned were shipped, and the shipowners are estopped thereby. It being well known that bills of lading are negotiated and that an indorsee may advance money on the strength of the statements contained therein, it was the duty of the master to see that the goods shipped and the shipping notes corresponded and that the quality marks were correctly stated in the bill of lading, and the shipowners are bound by the statement negligently made by him in the course of his duty.

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[Lord Esher, M.R. It was decided in *Grant* v. *Norway* (1) that the shipowner is not responsible to the indorsee when the master has signed a bill of lading for goods not on board.]

The master has no authority to sign for goods not on board, but he has authority to sign for goods that are on board, and, if he be guilty of negligence in describing them so as to mislead the indorsee, the shipowner is responsible.

They cited *Coventry* v. *Great Eastern Ry. Co.* (2); *Shaw* v. *Port Philip Gold Mining Co.* (3); *In re Bahia and San Francisco Ry. Co.* (4); *Howard* v. *Tucker* (5); *Hathesing* v. *Laing* (6); *Craven* v. *Ryder* (7); *MacKay* v. *Commercial Bank.* (8)

R. T. Reid, Q.C., and *Hollams*, for the defendants, were not called upon.

Lord Esher, M.R. The first point is whether on the true construction of the bill of lading, apart from any question of estoppel, there is a breach of contract by the shipowners in respect of which the plaintiffs as indorsees of the bill of lading for value can maintain their action. With regard to this question the plaintiffs are precisely in the same position as the shippers of the goods. It is impossible for them as indorsees of the bill of lading to contend that the contract is to receive any other construction than it would bear as between the shippers and the shipowners. Before the Bills of Lading Act the indorsee of a bill of lading could only sue in the name of the shipper. The only effect of that Act is to pass to him the rights and liabilities of the shipper under the contract. Therefore the question so far as this point is concerned is whether there was a breach of contract on which the shippers could have sued. The memorandum in the margin of the bill of lading says that "if quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain

(1) 10 C. B. 665.
(2) 11 Q. B. D. 776.
(3) 13 Q. B. D. 103.
(4) Law Rep. 3 Q. B. 584.
(5) 1 B. & Ad. 712.
(6) Law Rep. 17 Eq. 92, 97.
(7) 6 Taunt. 433.
(8) Law Rep. 5 P. C. 394, 411.

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and the ship shall be responsible for the correct delivery of the goods." It seems to me obvious that the words "such quality marks" mean marks used on the bales themselves, and that the meaning is that, if they are correctly inserted in the shipping notes which are made out by the shippers, then they are to appear in the bill of lading and the subsequent provisions of the memorandum will apply. But here the quality marks used on the bales were not correctly inserted in the shipping notes; consequently the provisions of the memorandum did not apply. It is said that to read the provision thus is to give it no substantial effect, and therefore it ought to be read as if the word "such" were not there. When language is ambiguous and capable of two meanings, then that meaning is to be preferred which gives some substantial operation to the words; but there is no canon of construction to the effect that, when the natural construction of words is clear, the Court is to add or strike out words for the purpose of giving some effect to the provision. I do not say that I think that these words would have no effect upon the construction we are giving them, but, assuming that to be so, we cannot help it. We must give the words their plain natural meaning. Therefore I think that there has been no breach of the contract between the shippers and shipowners contained in the bill of lading, which by the indorsement of such bill of lading passed to the plaintiffs, and that the plaintiffs cannot have a right of action on such contract.

But then, secondly, it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant* v. *Norway* (1). It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. The ground of

(1) 10 C. B. 665.

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that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading so as to bind his owners the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do. It was said that he ought to see that the quality marks were not incorrectly inserted in the bill of lading. But, apart from the special terms of the contract with regard to the quality marks, with which I have already dealt, I do not think it was his duty to put in these quality marks at all; all he had to do was to insert the leading marks. There is nothing in the case to shew that, irrespective of the particular contract, the quality marks had by the custom of the trade become a recognised part of the marks which it was his duty to insert. Furthermore, I doubt very much whether the indorsee, being placed by the Bills of Lading Act in the same position as if the contract between the shippers and shipowners had been made with him, can stand for this purpose in any different position from that of the shipper. For these reasons I think that the decision of the Court below was right.

Lindley, L.J. There are two points raised, one as to the alleged breach of contract, the other as to the alleged misrepresentation. With regard to the first, I think that, if the object of

the memorandum in the margin was to make the shipowners liable for the correctness of the quality marks inserted in the shipping notes, the language in which it has been expressed fails to convey that meaning. It seems to me that the effect of the words is not to throw any duty on the captain of seeing that the quality marks are correctly inserted in the shipping documents, but to throw that duty on the shippers. The provision is that, if quality marks are used on the bales, and "such" marks, that is, the marks so used, are inserted in the shipping notes, which it is admitted to be the shippers' duty to make out, then they are to be inserted in the bill of lading and the ship is to be responsible. We are asked to reject the word "such," but I do not see any valid reason for doing so. It is said that, unless we do so, we give the provision no effect. I am not sure of that; but for this provision it might not be the duty of the captain to insert quality marks in the bill of lading at all. In this case, therefore, the quality marks not being correctly inserted in the shipping notes by the shippers, the memorandum does not apply, and there is no breach of contract. Then, with regard to the contention that there is a representation on the bill of lading by which the shipowners were estopped, the answer seems to be this. The shipowners did not make any representation personally. The representation, if any, was made by the master. Then what is the master's authority? Has he such a general authority as would include an authority to give bills of lading with quality marks inserted, or has he a special authority in this respect? In this case the authority appears from the memorandum itself. It is to give bills of lading with quality marks inserted only when such quality marks are correctly inserted in the shipping notes. If that is so, it is impossible to take this case out of the decision in *Grant* v. *Norway*. (1)

Lopes, L.J. I agree with the Master of the Rolls and my Brother Lindley with regard to the construction of the clause in the bill of lading as to quality marks. It follows that there was no breach of contract. It was argued, secondly, that though the shippers would have no right of action against the shipowners,

(1) 10 C. B. 665.

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yet that the plaintiffs, as indorsees of the bill of lading, have one, because of the negligence of the master in signing a bill of lading which incorrectly represented the quality marks of the bales shipped. In my opinion it was no part of the master's duty to insert these quality marks at all, except in accordance with the provisions of the memorandum, and, therefore, he had no authority to make such a representation, and I do not think that any man of business was entitled to assume that he had such authority.

The principle that governs this case seems to me to be laid down in *Grant* v. *Norway*. (1) For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *W. A. Crump & Sons.*

Solicitors for defendants: *Hollams, Son, & Coward.*

E. L.

Nov. 12.

[IN THE COURT OF APPEAL.]

Ex parte CASTLE MAIL PACKETS COMPANY. In re PAYNE.

Bankruptcy — Order of Discharge — Suspension or Refusal — Discretion of Registrar—Appeal—Locus Standi—"Person aggrieved"—Costs—Undischarged Bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 104 (2).

An unpaid creditor of a bankrupt is a "person aggrieved" by the improper granting of an order of discharge to the bankrupt, and as such is entitled to appeal against the order.

Though the registrar has under s. 28 of the Bankruptcy Act, 1883, a judicial discretion as to granting, or refusing, or suspending a bankrupt's order of discharge, and the Court of Appeal will not readily interfere with the exercise of his discretion, if he has taken a right view of the facts, yet if, in the opinion of that Court, he has come to a wrong conclusion of fact with regard to the bankrupt's conduct, they will vary his decision by absolutely refusing an order of discharge when he has only suspended it.

The Court has jurisdiction to order an undischarged bankrupt to pay costs.

Appeal by the Castle Mail Packets Company, who were creditors of the bankrupts, G. H. Payne and Allen Courtney, against an order made by Mr. Registrar Hazlitt granting the bankrupt

(1) 10 C. B. 665.

Payne an order of discharge, but suspending its operation for a period of twelve months.

The bankrupts had carried on business in partnership as shipbrokers. A receiving order was made against them on the 5th of March, 1886, on the petition of the company, and on the 12th of April they were adjudicated bankrupts. On the hearing of an application by the bankrupt Payne for an order of discharge, the registrar held that the firm had continued to trade after knowing themselves to be insolvent, and that they had omitted to keep usual and proper books of account, and he suspended the order of discharge for twelve months.

The company opposed the granting of any order of discharge, on the ground that the bankrupts had been guilty of a fraudulent breach of trust towards them.

The bankrupts had acted as shipbrokers for the company and had from time to time received various sums of money in respect of freight for them. The company alleged that the bankrupts had omitted to pay over the whole of the sums which they had thus received; that they had employed the sums which they had thus retained for their own purposes; and that they had furnished to the company misleading accounts, which purported to shew that the bankrupts had received certain sums, but omitted to state that they had received other sums which they had actually received. And, when the company discovered the fraud and commenced an action on the 30th of December, 1885, against the bankrupts for the balance due to them, the bankrupts, on the 31st of December, for the first time made an entry in their books of a larger sum which was stated to be due to them from the company for certain commissions. In the action the bankrupts counter-claimed for this commission, and their counter-claim was dismissed, judgment being giving for the company for the balance which they claimed. It was in respect of this judgment debt that the company were petitioning creditors.

The registrar held that the bankrupts had been guilty of a breach of trust towards the company, but that there had not been any fraud.

The company appealed from the registrar's order, on the ground that an order of discharge ought to have been entirely refused.

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EX PARTE CASTLE MAIL PACKETS CO. IN RE PAYNE.

Winslow, Q.C., and *Herbert Reed*, for the appellants. The application for a discharge ought to have been entirely refused. In holding that there had not been any fraud in the conduct of the bankrupts, the registrar came to a wrong conclusion of fact. The true effect of the evidence is that the bankrupts had committed a fraudulent breach of trust, or, at any rate, a fraud, and, consequently, the registrar has not exercised any discretion as the amount of the punishment which ought to be awarded to the bankrupt having regard to the real facts of the case.

Cooper Willis, Q.C., for the bankrupts. A creditor has no locus standi to appeal from the refusal of the bankrupt's discharge; he is not a "person aggrieved" within the meaning of s. 104 (2) of the Bankruptcy Act, 1883: *Ex parte Sidebotham.* (1)

The registrar has under s. 28, in such a case as the present, a judicial discretion as to granting, or refusing, or suspending an order of discharge, and the Court of Appeal will not readily overrule his decision, especially for the purpose of increasing the punishment which he has inflicted. His conclusion of fact in the present case was right.

LORD ESHER, M.R. The registrar upon this application has given a modified judgment, not granting an immediate discharge, but postponing it for a year. That the registrar in dealing with such an application has a discretion cannot be doubted, and, if we had agreed with his view of the facts, and the appeal had been only against the mildness of his decision, I think it would have been difficult (I do not say impossible, but it would require a very strong case) to induce this Court to interfere. But, if the learned registrar has come to a conclusion of fact with which this Court does not agree, we cannot then take into account his exercise of discretion upon a view of the facts which we hold to be erroneous. If we come to the conclusion that he has gone materially wrong in his view of the facts, we are then in no way fettered by the amount of the sentence which he has thought fit to pass.

Now these bankrupts were brokers to a ship company, who, besides being the owners of ships, were trading with those ships.

(1) 14 Ch. D. 458.

Under such circumstances the broker has to procure passengers and goods to be carried by the ships. He has to collect from the owners of the goods and from the passengers "the freight," i.e., the payments for the carriage of the goods and the passengers, and, having collected it, of course it is his duty to account for it to the persons for whom he is acting as broker. It is his duty to collect the freight as nearly as he can.

Now, giving these bankrupts the widest scope, admitting that, by reason of the looseness of the mode in which business was conducted between them and the company, they were not bound to account at any specific time, as half-yearly or yearly, nevertheless it cannot be doubted that they were bound to send in their accounts within a reasonable time, and above all things they were bound not to send in accounts the inevitable result of which must be to mislead their principals. If, having received money, they sent in accounts which would lead their principals to suppose that they had not received other moneys which in fact they had received, that was a gross dereliction of duty. And, beyond that, if having received money in respect of which they ought to have accounted to their principals, they used it for their own private purposes, and then gave their principals misleading accounts in order to conceal what they had done, and knew that they had done, wrong, I have no doubt that, although this may not have been an indictable offence, it was a gross fraud upon their principals.

When this application for a discharge was made the first thing shewn by the opposing creditors was that the bankrupts had continued to trade after knowing themselves to be insolvent. That is no light offence. The opposing creditors also shewed that the bankrupts, acting as brokers, had received money from time to time for freights largely in excess of any deduction which they were entitled to make; that they did not merely neglect to send in accounts to their principals, but that they sent in misleading accounts, and that before doing so they had misappropriated to their own private use money for which they ought to have accounted; and that, therefore, the inevitable inference was that they had knowingly misused these moneys for which they ought to have accounted; that they knew they had done wrong,

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and that they sent in these misleading accounts in order to conceal what they had thus done. And, still worse, when they did send in a final account, in order to get rid of that which they knew to be a valid claim against them, they knowingly, falsely, and wickedly asserted that they had a counter-claim, which they knew to be wholly unfounded.

What offences, then, have they been guilty of? Besides trading after they knew they were insolvent, they have for their own purposes, and in order to conceal a fraud, made an improper and fraudulent entry in their books. I will not say that they have been in the strict sense of the words guilty of a fraudulent breach of trust, but any more fraudulent conduct in business as between principal and agent I cannot conceive. I come, therefore, to the clear conclusion that these bankrupts have been guilty of three offences against the Bankruptcy Act: by trading after they knew that they were insolvent; by sending in misleading accounts and making misleading entries in their books; and by committing a wicked fraud upon their employers.

Under these circumstances the bankrupt Payne applied for his discharge, and in my opinion the only proper course is to refuse the application altogether.

Lindley, L.J. The first point to be considered is, whether a creditor is a "person aggrieved" by the granting of an order of discharge, and therefore capable of appealing against it. I cannot understand upon what principle it can be said that an unpaid creditor is not affected by the granting an order of discharge to his debtor. The operation of the order, if granted, is to preclude him from all remedy against the debtor, and to limit his rights to a right of payment of a dividend out of the debtor's estate. It appears to me impossible to say that an unpaid creditor is not entitled to appeal against an order of discharge as a "person aggrieved," if the order has been improperly made.

On the substance of the case I entirely agree with the Master of the Rolls that, if the learned registrar had taken the same view of the facts as we do, and had come to the conclusion that, having regard to those facts, a year's suspension of the discharge was a sufficient punishment, it would have been very difficult for us to

differ from his conclusion. But the registrar has taken a view of the facts which is utterly opposed to that which, in our judgment, ought to be taken. He has come to the conclusion that, though there was irregular and improper conduct on the part of the bankrupts, there was nothing fraudulent, and on that footing it was natural that he should not suspend the discharge for more than twelve months. But the opposing creditors have appealed upon the ground that the learned registrar has not given full effect to the evidence before him, and they have contended that the conduct of the bankrupts was really fraudulent, and it appears to me that that charge is substantially made out. By the evidence I am driven to the conclusion that this bankrupt knew perfectly well that he was keeping back moneys of his employers which he had no right to keep back, and that he was sending to them accounts in such a shape as to lead them to suppose he was accounting for all the money which he had received on their behalf, and for which he was bound to account, whereas he was doing nothing of the kind. It is much to be regretted that, when the action was brought against him on the 30th of December, 1885, he on the very next day caused to be entered in the ledger something which he was pleased to set up as a cross-claim, but which, when the facts are inquired into, was clearly a perfectly idle claim. I am compelled to say that he has been guilty of a gross fraud. Whether technically there has been a "fraudulent breach of trust" may be open to question. I am inclined to think that a man who, knowing that he has a balance to pay over to his employers, embezzles it, may fairly be said to be guilty of fraudulent conduct as a trustee. But, at any rate, it is clear that he comes within sub-s. 3 (*h*) of s. 28 as having been guilty of fraud. In my opinion, therefore, the order of discharge ought to be refused.

Lopes, L.J. If the learned registrar had exercised the discretion given to him by s. 28 with reference to that which we consider the right view of the facts, I take it that this Court would not have interfered with his discretion. But he has found that, though there was a breach of trust by the bankrupts, it was not fraudulent. With all respect to the registrar I am at a loss

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Ex parte Castle Mail Packets Co. In re Payne.

Lopes L.J.

to conceive how he could have arrived at such a conclusion. It is clear that on many occasions the bankrupts rendered accounts to their employers in which no mention whatever was made of large sums which they had then received, and which ought to have been accounted for, and the money which they did not thus account for was beyond all question kept back by them and used for their own purposes. On that mere statement, which is practically undisputed, could any reasonable man of business doubt that it was a fraudulent transaction? Could he for a moment doubt that this course was pursued by the bankrupts for the purpose of misleading their employers, and with the object of utilising for their own purposes money which did not belong to them? But that is not all. A large sum of money was in December, 1885, owing to the principals. They had then discovered the fraud which had been committed upon them, and on the 30th of December they issued a writ to recover the amount due. Up to that time no claim had been made upon them by the bankrupts in respect of commission, but the very next day there appeared for the first time an entry in their books in respect of sums amounting to £16,000 which they alleged to be due from their principals to them. Can any one doubt that they intended by means of a claim which they knew to be unfounded to wipe out a debt which they knew they owed, and which had been brought about by their own fraud? I am clearly of opinion that the bankrupts have committed three offences: they have not kept proper books; they have continued to trade after they knew they were insolvent; and they have been guilty of fraud.

The point was taken that the appellants are not "persons aggrieved" within the meaning of s. 104. I am at a loss to see how an unpaid creditor is not a "person aggrieved" by the improper granting of an order of discharge to his debtor. In my opinion the order of discharge ought to be refused.

Cooper Willis, Q.C. No order will be made against the bankrupt Payne for costs. It is contrary to the practice of the Court to order an undischarged bankrupt, who has no estate, all his property being vested in his trustee, to pay costs: *Ex parte Baum.* (1)

(1) 7 Ch. D. 719.

LORD ESHER, M.R. The Court has jurisdiction to make such an order, and we think it right that it should be made in the present case.

LINDLEY, L.J., and LOPES, L.J., concurred.

Solicitors for appellants: *Parker, Garrett, & Parker.*

Solicitors for bankrupts: *Redpath & Holdsworth.*

W. L. C.

NICHOLSON *v.* THE ASSESSMENT COMMITTEE OF THE HOLBORN UNION.

Dec. 6.

Poor-rate—Occupation—Building used for Public Purposes connected with Government—Middlesex Sessions House.

By an Act passed in 1777 justices were empowered to buy land and build a sessions house, which was not to be rated at a higher figure than the assessment of the site at the date of the Act.

In 1879 the justices, acting under further statutory powers, bought additional land, and built additions and enlargements to the sessions house.

The sessions house with the additions was used solely for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county.

An officer employed in the business of the sessions resided on the premises with his family.

From 1777 to 1879 the sessions house was rated at the assessment of 1777. Afterwards the assessment was raised and the justices appealed:—

Held, that the buildings being used for public purposes connected with the government of the country were not liable to be rated to the poor-rate, for the case came within the principle of *Coomber* v. *Justices of Berks* (9 App. Cas. 61), and neither the provisions of the Act of 1777, nor the fact that a rate at the valuation named in that Act had been acquiesced in and paid, deprived the justices of their right to contest the rateability of the premises.

SPECIAL CASE containing the following statements:—

This is an appeal by the Clerk of the Peace on behalf of the justices of the county of Middlesex against the assessment of the sessions house, situate at Clerkenwell Green, within the metropolis, as defined by the Valuation (Metropolis) Act, 1869, and comprised in the valuation list for the parish of St. James and St. John, Clerkenwell, as approved by the respondents.

By 18 Geo. 3, c. 67, such persons as for the time being should be in the commission of the peace for the county of Middlesex

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were constituted commissioners for building a new sessions house for the county, for which purpose they were empowered to purchase such one or more piece or pieces of ground as they or any seven of them should judge to be a convenient site for such new sessions house.

The Act further provided that it should be lawful for the commissioners or any seven of them "to cause a new session house, with all proper and necessary apartments and offices, to be erected on such piece or pieces of ground for the use of the said county of Middlesex, and for other good and necessary purposes for the better performance of the King's service in the said county; as also to fit up and provide with all necessary accommodations the same session house in a suitable manner, and to contract and agree with any person or persons for the building, fitting up, and providing with all necessary accommodations, such new session house, as to them the said commissioners, or any seven of them, should from time to time seem meet; which new session house so to be erected in manner aforesaid, with its appurtenances, should not be rated or assessed for or towards the payment of the sewer's tax, land tax, or any public, parochial, or other rate or tax whatsoever, assessed or to be assessed by authority of Parliament, or otherwise howsoever, at or for a higher rate or assessment than what the piece or pieces of ground and buildings, if any, thereon to be purchased for the erection of such new session house, was or were rated, or assessed, or did pay to such several rates or taxes in the year 1777."

In pursuance of the powers of the said Act land was purchased by the commissioners at Clerkenwell Green and a sessions house erected thereon. The assessment in the year 1777 of the land so purchased was, gross value, 135*l.*; rateable value, 113*l.*

The accommodation afforded by the sessions house having in course of time become inadequate for the public business of the county, the justices entered into negotiations with the Metropolitan Board of Works for the acquisition of additional land, with a view to the enlargement of the buildings. By the Metropolitan Board of Works (Various Powers) Act, 1875 (38 & 39 Vict. c. clxxix.), s. 27, the Board were authorized to grant for and to the use of the justices certain land therein described adjoining

the sessions house, and it was provided that the said land should vest in the body or officer or person in whom the sessions house was vested, and should go along with and be deemed part of the appurtenances of the sessions house.

Sect. 28 of the same Act provided for the sale and conveyance by the Board of Works to the justices of certain land for building purposes, and the ascertainment and payment of the price.

In pursuance of the said sections land was on the 5th of October, 1877, appropriated and granted and conveyed by the Board to the use of the Clerk of the Peace of the county (being the officer in whom the sessions house was vested) and his successors for ever, in trust for the purposes of the county, and as to so much of the land as was conveyed under the power given to the Board by the 27th section, so that the said land might go along with and be deemed part of the appurtenances of the sessions house.

Upon the land so conveyed the justices erected additions and enlargements to the sessions house.

The whole of the sessions house, including the additions and enlargements, is occupied and used by the justices, their officers, clerks and servants, solely and exclusively for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county.

Certain rooms in the sessions house are and have been for many years assigned by the justices to Mr. Wright, who is a joint clerk of committees to the justices, and keeper of the sessions house. As keeper of the sessions house Mr. Wright is obliged to reside on the premises, and occupies by himself and his family (in addition to two offices) a sitting-room and six bedrooms.

Mr. Beal, the acting joint clerk of committees to the justices, is permitted by the justices to occupy in the sessions house an office in which to discharge his duties as such clerk.

The justices do not receive from Mr. Wright or Mr. Beal in respect of their occupation any rent or other consideration beyond the performance of the duties of their respective offices.

From the first erection of the sessions house until the year 1879 the assessment thereof for the poor-rate and for other purposes was after the same rate at which the ground whereon the sessions house was erected was assessed in the year 1777, namely,

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gross value, 135*l.*; rateable value, 113*l.* In the year 1879, by a provisional valuation list, made under the Valuation (Metropolis) Act, 1869, the assessment was increased, in respect of the additions and enlargements to the sessions house, which had then been made, to—gross value, 800*l.*; rateable value, 667*l.* The justices objected before the assessment committee to the increased assessment, who reduced the amounts to—gross value, 465*l.*; rateable value, 388*l.* These figures were made up by adding to the old assessment of 1777, in respect of the additions and enlargements, 330*l.* to the gross value and 275*l.* to the rateable value. The justices did not appeal to the assessment sessions.

In 1885 the assessment was increased to a gross value of 610*l.* and a rateable value of 509*l.*

Notice of appeal was given, and this case was then stated in pursuance of s. 40 of the Valuation (Metropolis) Act, 1869.

Either party was to be at liberty to refer to any of the above-mentioned Acts, conveyances, or other documents, as part of the case.

The questions for the opinion of the Court were:—

1. Does the sessions house come within the description of rateable property, the subject of the Valuation (Metropolis) Act, 1869?

2. If rateable, can the said sessions house be lawfully rated at a higher assessment than a gross value of 135*l.*, and a rateable value of 113*l.*?

The parties to the appeal had agreed that judgment in conformity with the decision of the Court was to be entered at the court of general assessment sessions.

R. S. Wright, for the appellant. The sessions house is altogether exempt from rateability. This is clear from the fact stated in the case, that it is used "solely and exclusively for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county." In *Reg.* v. *Justices of Worcestershire* (1) and *Hodgson* v. *Local Board of Health of Carlisle* (2), buildings used in the same way were held

(1) 11 A. & E. 57. (2) 8 E. & B. 116.

to be exempt from the poor-rate and from a district rate; and in *Coomber* v. *Justices of Berks* (1) from income tax. The principle of the last-named case applies here, and the decision of the House of Lords is conclusive in favour of the present appellant. *Reg.* v. *Stewart* (2), where the buildings were occupied by a storekeeper in the service of the Crown, is a strong authority to the same effect. The justices are appointed by and act for the Crown, which brings the case within the rule stated by Blackburn, J., in *Mersey Docks* v. *Cameron* (3), and adopted by Lord Watson in *Coomber* v. *Justices of Berks.* (4) The public business of the county is the business of the Crown. If this contention is correct, the second question does not arise; if it is not, the assessment is limited by 18 Geo. 3, c. 67, to the value specified in that Act.

Poland (*Castle*, with him), for the respondents. Since the decisions of the House of Lords which have been referred to it must be admitted that Crown property is not rateable, but the present case is distinguishable, because the sessions house is used for the discharge of the public business of the county, which puts it in the same position as a municipal building. The true reason of the exemption of Crown property is that the Crown is not named in the Act for the Relief of the Poor (43 Eliz. c. 2), and therefore the exemption should be confined to that which is strictly speaking Crown property. The occupation by the keeper of the sessions house with his family is a beneficial occupation: it must have been taken into consideration in fixing his salary. The true construction of 18 Geo. 3, c. 67, is that it is a parliamentary contract that the sessions house shall be rateable, and this view has been acquiesced in for more than a century. The limit named in that Act does not apply to the additional land since taken, which is rateable at its full value.

He also referred to *Reg.* v. *Overseers of Manchester* (5); *Reg.* v. *Foundling Hospital.* (6)

R. S. Wright, replied.

(1) 9 Q. B. D. 17; 10 Q. B. D. 267; 9 App. Cas. 61.

(2) 8 E. & B. 360; 27 L. J. (M.C.) 81.

(3) 11 H. L. C. at pp. 464, 465; 35 L. J. (M.C.) at p. 10.

(4) 9 App. Cas. at pp. 72, 73.

(5) 3 E. & B. 336; 23 L. J. (M.C.) 48.

(6) Law Rep. 7 Q. B. 83.

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DENMAN, J. After hearing the arguments on both sides, I find it impossible to distinguish the present case from the principle of the decision in *Coomber* v. *Justices of Berks.* (1) The question in that case was whether income tax was payable in respect of the buildings in which the assizes for the county were held, and the surrounding accommodation. It was stated in the case there that certain married constables resided on the premises in question, but it also appears from that and the other decisions which have been referred to that it matters not whether a married man lives on the premises, unless he is supplied with more accommodation than is reasonably required for the purposes for which he lives there, provided the premises are otherwise exempt. In that case it was found that the use of the buildings was solely official. In the Court of Appeal the judgment was put on the ground that although the buildings were not in the fullest and strictest sense Crown property, yet they were in the nature of Crown property, because they were used for public purposes connected with the government of the country. In the House of Lords Lord Blackburn went fully into the cases, and though he seemed to think that it might possibly have been open to the House of Lords to come to a different conclusion but for the course of decisions, he held that when a duty is cast on justices, to be carried out in aid of the general government of the country, the principle applies, and the buildings used for the purposes of such duty are exempt. Lord Watson and Lord Bramwell also gave judgment in favour of the exemption on the ground that the buildings were occupied in respect of public functions. In the present case the buildings are occupied by the magistrates in respect of public functions. Justices of the peace have many important duties to perform. Their first duty is that of preserving the public peace, and in addition to this they have many other important functions. I think that, generally speaking, all their duties are in aid of the general government of the country, and if that is so, it is impossible to distinguish the present case from *Coomber* v. *Justices of Berks.* (1) The case of *Reg.* v. *Stewart* (2) shews that the mere fact of a family living on the

(1) 9 Q. B. D. 17; 10 Q. B. D. 267; 9 App. Cas. 61.
(2) 8 E. & B. 360; 27 L. J. (M.C.) 81.

premises will not make the property rateable if it is otherwise exempt, and the Courts will not be nice to pick out small circumstances such as this where the property in question is substantially a public building.

Another point was raised as to how far the Act of 1777 (18 Geo. 3, c. 67) not only limited the rate then to be imposed, but fixed it for future time. If I thought the statute fixed the rate at all I should think that the additions since erected on land subsequently purchased would be rateable, and that the gross and rateable values of the whole premises would not be limited to 135*l.* and 113*l.*, but I do not think that the clause in the statute which fixed those values concludes the justices from contending that the property is not rateable and appealing against the assessment.

I am of opinion that the property in question is not rateable, and therefore the appeal ought to be allowed.

HAWKINS, J. I am of opinion that this property is not rateable within the meaning of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), according to the principle established by the authorities which have been referred to.

Mr. Poland tried to establish that the Act of 1777 made the property rateable, but I cannot agree with that contention. I think the statute means this, that if the premises should ever be occupied so as to be rateable they should not be assessed at a higher value than the sum named, that being the sum at which the value of the site was fixed, and any additional buildings afterwards erected on subsequently acquired land would be unaffected by the statute, so that if the premises should become rateable they would be assessed at the value named in the Act, or a less sum, plus the value of the new buildings.

Judgment for the appellant.

Solicitor for appellant: *Sir Richard Nicholson.*
Solicitor for respondents: *E. W. James.*

P. B. H.

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Nov. 12, 15.

[IN THE COURT OF APPEAL.]

Ex parte KEARSLEY. In re GENESE.

Bankruptcy — Composition — Approval by Court—Discretion of Registrar—Appeal —Special Resolution—Confirmation —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 23, 28.

A special resolution of creditors under s. 23 of the Bankruptcy Act, 1883, entertaining a proposal for a composition after an adjudication of bankruptcy, requires confirmation at a second meeting of the creditors, in the same way as a special resolution under s. 18 entertaining a similar proposal before adjudication.

In the exercise of his discretion as to the approval of a composition or scheme, the registrar ought to consider both the interest of the creditors and the conduct of the debtor, and if it is manifest that the composition or scheme is the best thing for the creditors, the registrar is not bound to refuse to approve of it because the debtor has been guilty of offences under s. 28, sub-s. 3, of the Act.

The Court of Appeal will not review the discretion of the registrar in approving of a composition or scheme, unless it is clear that he has exercised it wrongly.

Appeal by some creditors of Samson Genese, a tailor, who had been adjudicated a bankrupt, from an order made by the registrar approving of a composition, which had been accepted by the creditors under the provisions of s. 23 of the Bankruptcy Act, 1883.

The adjudication was made on the 1st of October, 1885.

A special resolution of the creditors, passed at a meeting held on the 19th of May, 1886, provided that a composition of 3*s.* in the pound should be accepted in full satisfaction of the debts due to the creditors under the bankruptcy, payable in three instalments of 1*s.* each respectively, in fourteen days, four months, and eight months, from the confirmation of the composition by the Court. The last two instalments to be secured to the satisfaction of the committee of inspection. The bankrupt was also to pay in full, within fourteen days from the confirmation by the Court, whatever amount might be due to the trustee on trading account, and all preferential claims, costs, charges, remuneration, and expenses of the official receiver, trustee, and trustee's solicitor.

The resolution was confirmed at a subsequent meeting on the 14th of July, 1886, by a majority in number, representing three-fourths in value, of all the creditors who had proved.

[It was afterwards alleged by some dissentient creditors that the votes had not been properly counted, and that the confirming resolution had not been duly passed, but the Court of Appeal held, upon the evidence, that this objection was unfounded.]

The official receiver made a report to the Court, dated the 4th of August, 1886, in which he said that the debtor's statement of his affairs submitted on the 4th of January, 1885, shewed that the liabilities expected by him to rank against his estate, amounted to 9335*l.* 13*s.* 7*d.*, and that his assets available for the payment of unsecured creditors, after deducting the claims of preferential creditors, were estimated by him to produce 6133*l.* 7*s.* 9*d.* The amount required to pay the composition of 3*s.* in the pound, upon the indebtedness shewn in the statement of affairs, was 1395*l.* 7*s.* 4*d.*, which, assuming the bankrupt's estimate of his assets to be correct, would leave a surplus of 4738*l.* 0*s.* 5*d.* Consequently, apart from several matters under s. 28, which the official receiver had reported to the Court on the 8th of February, 1886, he submitted that the proposed composition did not appear to be either reasonable or calculated to benefit the general body of creditors.

In his report of the 8th of February, 1886, the official receiver stated that the bankrupt had committed offences under s. 28 of the Act, by not having kept proper books of account for the purposes of his business, and by having compounded with his creditors in the year 1868.

A settlement made by the bankrupt on his marriage had been set aside by the Court in the bankruptcy, and a judgment against him by consent in favour of the trustees of the settlement had also been set aside as a fraudulent preference.

The trustee in the bankruptcy reported to the Court that he estimated the value of the bankrupt's assets on the 12th of August to be 2550*l.* The preferential debts were 68*l.* 6*s.*; there was due to the trustee on trading account 319*l.* 11*s.* 8*d.*, and he estimated the costs and trustee's remuneration at 1000*l.* The composition of 3*s.* in the pound on the debts proved (about 8900*l.*) would

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amount to 1335*l.*—total 2722*l.* 18*s.* 9*d.*, thus shewing a deficiency in the assets.

The registrar approved of the composition. Some of the dissentient creditors appealed.

Muir Mackenzie, for the appellants. There are three grounds on which the registrar ought not to have approved of the composition:

(1.) The resolutions were not carried at the second meeting by the proper majority of three-fourths, as required by sub-s. 2 of s. 18, which applies to proceedings under s. 23 (1). Some creditors who had proved were omitted from the calculation.

(2.) Having regard to the amount of the bankrupt's assets, as shewn by his own statement of affairs, the composition is not "reasonable or calculated to benefit the general body of creditors."

(3.) Considering the offences which the bankrupt is proved to have committed under s. 28, the registrar ought not to have sanctioned any composition at all. The registrar in his judg-

(1) Sect. 18: "The creditors may at the first meeting, or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs.

(2.) "The composition or scheme shall not be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three-fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors, and is approved by the Court.

(4.) "The debtor or the official receiver may, after the composition or scheme is accepted by the creditors, apply to the Court to approve it.

(6.) If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

Sect. 23. "Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication."

ment did not make any reference to the fraudulent preference of the trustees of the settlement, and the fair inference is that he did not take it into consideration at all. The bankrupt has committed at least three of the offences mentioned in s. 28; he has not kept proper books; he has fraudulently preferred the trustees of his settlement; and on a previous occasion he compounded with his creditors.

Herbert Reed, for the bankrupt. First, all the creditors who had properly proved their debts were taken into account in estimating the majority. But, even if the creditors who are said to have been wrongly omitted had been taken into account, there would have been a sufficient majority. Secondly, in the case of a composition or scheme under s. 23, a confirmatory resolution, passed at a second meeting of the creditors, is not required as it is in the case of a composition or scheme under s. 18. When sub-s. 1 of s. 23 speaks of a composition or scheme *accepted* before adjudication," it does not mean *entertained*, as in sub-s. 1 of s. 18; but it means, as is shewn by sub-s. 4 of s. 18, a composition or scheme which has been *accepted* under s. 18, in the sense of having been "entertained" by a special resolution passed at the first meeting, and "confirmed" by a resolution passed by a majority of three fourths in value at a second meeting. Therefore, when a composition has been "entertained" by a special resolution under s. 23 (1), no second meeting is required, but the proceedings then to be taken are the same as those which have to be taken under s. 18 after the confirmatory resolution at the second meeting. And there is a difference in substance between the two cases. In the case of a composition or scheme under s. 18 the notice of the first meeting (Form No. 57 in the schedule to the Bankruptcy Rules, 1883), can contain no information as to the terms of any composition or scheme which it is intended to propose—indeed, those terms would probably not be known before the meeting; therefore, a second meeting is necessary, in order to give creditors who were not present at the first an opportunity of voting upon any composition or scheme which may be proposed at that meeting. In the case of a composition under s. 23 after adjudication, the notice of the meeting (Form No. 62) would contain a statement

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of the terms of the composition or scheme which the meeting is summoned to consider, and consequently all the creditors would have an opportunity of attending the meeting and voting upon the proposal, and there would be no reason for having a second meeting. Thirdly, as to the reasonableness of the proposed composition of three shillings, the value of the assets given in the debtor's statement of affairs was a mere estimate, and the estimate of the present value made by the trustee is that on which the Court ought to act. The registrar has under s. 18 a discretion as to approving of a composition, and this Court will not as a rule interfere with the exercise of that discretion: *Ex parte Ledger.* (1) The matter of the fraudulent preference was fully brought before the registrar, and he must have taken it into consideration.

Muir Mackenzie, in reply. The Court is not bound by the wishes of the creditors, but will consider the conduct of the debtor: *Ex parte Campbell.* (2)

Here the composition is so utterly unreasonable that it ought not to be forced upon dissentient creditors. The creditors will get a much better dividend if the bankruptcy continues.

Lord Esher, M.R. Several objections have been raised to the approval of the composition by the registrar.

The first objection is that the requisite assents of creditors in number and value was not given at the second meeting, assuming that the creditors were bound to act at a second meeting. We have heard the evidence, and we are not prepared to set aside the composition on this ground.

The point was taken, that the first objection did not arise at all, because, in the case of a composition or scheme under s. 23, a confirmatory meeting is not necessary. Having regard to the words of ss. 18 and 23, and also to the rules and the headings of them, I have no doubt that a second meeting of creditors is just as necessary under s. 23 as under s. 18. It seems to me clear that the words "entertain" and "accepted" are used in sub-s. 1 of s. 23 as synonymous. Under both sections it is at the first meeting that the composition or scheme is "entertained," and

(1) 3 Morrell's Bank. Cas. 169. (2) 15 Q. B. D. 213.

in that sense "accepted," but in both cases that which is done at the first meeting must be confirmed at a second meeting before it can become binding. You can only "confirm" that which has been already "entertained" or "accepted" for you. I feel no doubt on this point, though it is not absolutely necessary to decide it, because we cannot say that the proper majority of creditors did not assent to the composition at the second meeting.

This being so, it was the duty of the registrar to approve the composition if he thought it was reasonable and calculated to benefit the general body of creditors, and there was no countervailing reason for refusing to approve it; but, if he thought it was not, or if he was not satisfied that it was, it was his duty to refuse to approve it. In the present case the debtor had been guilty of various offences under s. 28, one of them being a fraudulent preference. That is no light matter, for it is an attempt to cheat the general body of creditors. It has been argued that, however advantageous to the creditors a composition or scheme may be, the registrar ought not to approve it, if the debtor has been guilty of any of the offences mentioned in sub-s. 3 of s. 28. I cannot quite agree with that view. I think that the registrar ought to look very closely into the matter. So far as the effect of it will be to release the debtor from liability his conduct ought to be very carefully examined. But it is also the duty of the registrar to have regard to the interest of the creditors, and, if the composition or scheme is clearly the best thing for the creditors, I cannot think that the registrar is bound in law to refuse to approve it, because the debtor has been guilty of offences under s. 28. The registrar ought to look at both sides, and not to punish the creditors by over strictness in regard to the conduct of the debtor. It is a matter of discretion, and the Court of Appeal ought not to interfere, unless it is clear that the registrar has exercised his discretion wrongly. If I were satisfied that this composition was clearly the best thing which could be done for the creditors, I should not be disposed in this case to interfere with the registrar's order because of the conduct of the debtor. But I look with distrust on the figures which have been presented to us,—on the trustee's estimate of the probability of recovering the debts which are due to the estate—and I regard

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with considerable suspicion his estimate of the amount of his own remuneration and costs. I am not satisfied that 3*s.* in the pound was a reasonable composition for the creditors to accept, indeed I am wholly dissatisfied about it. I think it extremely probable that the creditors will get a better dividend if the bankruptcy continues. I think that the registrar did not pay sufficient attention to several of the matters which were brought before him. I think that he ought not to have been satisfied that the composition was a reasonable one, and ought not to have approved of it.

LINDLEY, L.J. This case is a singular one in this respect, that the registrar has approved of a composition which had been reported against by the official receiver. With regard to the suggestion that under s. 23 it is not necessary that the composition or scheme should be confirmed at a second meeting of the creditors, I have looked carefully at ss. 18 and 23, and at the rules which bear on the matter, and though, having regard to the evidence as to the number of creditors who gave their assent at the second meeting, it is not absolutely necessary to decide the point, it appears to me that the word "accepted" in sub-s. 1 of s. 23 means entertained at the first meeting of the creditors, and that a second meeting is necessary under both sections. What, then, is the duty of the Court in dealing with a matter of this kind? It is laid down in sub-s. 6 of s. 18. It is the duty of the Court to look, not only at the interest of the creditors, but also at the conduct of the debtor. Under some of the circumstances mentioned in sub-s. 6, however beneficial the composition or scheme may be to the creditors, it is the duty of the Court by reason of the conduct of the debtor to refuse to sanction it. The present case, however, is not one of that kind. But, even in such a case as the present, the conduct of the debtor is to be looked at, and that ingredient is of the more importance whenever it is extremely doubtful whether the proposed composition or scheme is the best thing for the creditors. If it is obviously the most advantageous thing for the creditors, the conduct of the debtor becomes of less importance. In the present case I am not at all satisfied that the composition is really for the benefit of the creditors; I think it was really intended to preserve the debtor's

business for him. I think the registrar has failed to give due weight to the fraudulent preference, which is a serious matter. The registrar ought to take great care that an improper composition or scheme is not forced upon dissentient creditors, and I think that is what has been done in the present case.

LOPES, L.J. I am not prepared to say that a sufficient majority of creditors did not assent to the composition at the second meeting. I am also of opinion that a confirmatory meeting is as necessary under s. 23 as under s. 18.

In approving or refusing to approve the composition, the Court has to consider the interest of the creditors, and the conduct of the debtor. Sub-s. 6 of s. 18, clearly defines how the Court is to proceed. If the composition is not reasonable, or not likely to benefit the general body of creditors, or where the Court is required to refuse the discharge of the debtor, if adjudged bankrupt, the Court must refuse to approve, but if such facts are proved as would justify the Court in refusing, qualifying, or suspending the debtor's discharge under s. 28, the Court may refuse to approve, the composition. The present case comes under the latter part of the rule.

The circumstances differ in almost every case. It would be impossible to lay down any general rule applicable to all cases. But I understand it to be left to the discretion of the Court, when a composition appears reasonable, to determine whether the conduct of the debtor is such as to make it more expedient in the interest of the public to punish him than to consult only the interest of the creditors. The Court of Appeal would be slow to review such a discretion unless it was made clear it was wrongly exercised. I am clearly of opinion that this composition ought not to be approved.

LORD ESHER, M.R. The appellants will have their costs of the appeal out of the bankrupt's estate.

Solicitor for appellants: *R. Raphael.*

Solicitors for bankrupt: *W. Bagot Harte & Co.*

W. L. C.

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Nov. 6, 8;
Dec. 15.

[IN THE COURT OF APPEAL.]

DICKSON *v.* GREAT NORTHERN RAILWAY COMPANY.

Railway Company—Carrier—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 7—*Carriage of Dogs—Reasonable Condition.*

A condition, contained in a ticket signed by a person delivering a dog for carriage to a railway company, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of 2*l.* unless a higher value be declared at the time of delivery to the company and a percentage of 5 per cent. paid upon the excess of value beyond the 2*l.* so declared":—

Held, that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions: and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the Act, and therefore did not protect the railway company from liability to an amount exceeding 2*l.* in respect of damage done to the dog through the negligence of their servants.

APPEAL from the judgment of the Queen's Bench Division, reversing the decision of the judge of the Newcastle County Court.

The action was brought in the county court in respect of injury occasioned, through the negligence of the defendants' servants, to a greyhound belonging to the plaintiff, which had been delivered to the defendants for carriage from London to Newcastle. The defendants had paid 2*l.* into court, and with regard to any further amount pleaded the terms of a condition contained in a printed ticket signed by the plaintiff's servant, in the form required by the defendants to be signed by all persons sending dogs by their railway, upon the delivery of the dog to the defendants for carriage. The terms of the condition were as follows: "Notice is hereby given that the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof or for injury thereto beyond the sum of 2*l.* unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per

cent. paid upon the excess of value beyond the 2*l.* so declared." The value of the plaintiff's dog was 60*l.* No declaration was made of the value at the time of the delivery of the dog to the company, nor any payment beyond the ordinary fare for the carriage of a dog from London to Newcastle, which was 6*s.* While the dog was in the charge of the defendants a porter negligently wheeled a barrow over its tail, and it was so much injured as to be deteriorated in value to the extent of 25*l.* The county court judge held that the above-mentioned condition was unreasonable, and therefore void under the Railway and Canal Traffic Act, 1854, and gave judgment for the plaintiff for 23*l.* over and above the 2*l.* paid into Court.

The Divisional Court (Mathew and A. L. Smith, JJ.) on appeal reversed his decision.

J. Lawson Walton, for the plaintiff. The condition was unreasonable. The refusal of the defendants to be common carriers of dogs or to carry them except on the terms stated in the condition is a breach of the obligation imposed upon them by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2. It is submitted that the effect of the legislation is that they are bound to carry dogs, like goods, as common carriers. They cannot refuse to be common carriers of dogs, because that would be to subject one class of traffic to an undue disadvantage. The owners of dogs, though paying the ordinary rate of fare, would not get the ordinary value for it, viz., the liability of the company as common carriers. Dogs are in no different position for this purpose from that of any other class of chattels. Assuming that the provisions of s. 7 of the Railway and Canal Traffic Act, 1854, apply to dogs, and that the defendants could by a special contract limit their liability as carriers of dogs, it must be by a contract the terms of which are reasonable. The effect of this condition is that they will not be common carriers of dogs at all, nor will they even be liable for negligence, wilful misconduct, or dishonesty on the part of their servants, unless a percentage on the value is paid, or, in other words, an insurance rate; and, where such insurance rate is paid, they do not undertake to insure the dog, because they do not then accept the position of common

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carriers, but only of bailees for hire. Again, it is clear that in order that such a condition may be reasonable there must be a reasonable alternative offered. It may be reasonable for a company, charging a reasonable amount in respect of goods carried on the ordinary carriers' liability, to say that, if the goods are carried at a lower rate, they must be at owner's risk; but here the percentage rate is so high that in many cases there would be no real alternative but to send the dog at owner's risk. Take the case of a carriage of a dog worth 60*l.* for a few miles. There must be some consideration to the consignor for giving up the ordinary liability of the carriers. There is none here. They cited *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (1); *Ashendon* v. *London, Brighton, and South Coast Ry. Co.* (2); *McManus* v. *Lancashire and Yorkshire Ry. Co.* (3); *Peek* v. *North Staffordshire Ry. Co.* (4); *Aberdeen Commercial Company* v. *Great North of Scotland Ry. Co.* (5); *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown* (6); *Lewis* v. *Great Western Ry. Co.* (7).

Cyril Dodd, for the defendants. No statute imposes on the railway company the duty of carrying dogs, though a rate is given by their Acts in case they choose to do so. It has been decided that a railway company are only common carriers of things which they profess to carry as such: *Oxlade* v. *North Eastern Ry. Co.* (8); *Johnson* v. *Midland Ry. Co.* (9). It is not denied that, if they carry dogs, they are bound to carry them on reasonable terms. The condition in this case was reasonable. It is submitted that it is not necessary to contend that the condition would be reasonable as applied to all circumstances, e.g., in the case of every distance, however short, for which a dog is carried. The question is whether it was reasonable as applied to the circumstances of this particular case, viz., to a carriage from London to Newcastle. A contract of this sort is reasonable, because it is precisely analogous to the provisions made by the legislature itself with regard to some animals in the 7th

(1) 2 B. & S. 122; 29 L. J. (Q.B.) 209.
(2) 5 Ex. D. 190.
(3) 4 H. & N. 327; 28 L. J. (Ex.) 353.
(4) 10 H. L. C. 473.
(5) 3 Nev. & Macn. 205.
(6) 8 App. Cas. 703.
(7) 3 Q. B. D. 195.
(8) 1 C. B. (N.S.) 454.
(9) 4 Ex. 367.

section of the Railway and Canal Traffic Act, 1854. Cases like *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (1) and *Ashendon* v. *London, Brighton, and South Coast Ry. Co.* (2) are distinguishable, because there the company sought to relieve themselves of all liability whatever in respect of dogs above a certain value, unless the value was declared. Here the company undertake liability for a reasonable amount of damage, where the value is not declared. The principle of the cases is that the company cannot destroy their liability altogether, they can only limit it by reasonable conditions. He cited *Beal* v. *South Devon Ry. Co.* (3); *Robinson* v. *South Western Ry. Co.* (4); *Gregory* v. *West Midland Ry. Co.* (5)

Walton, in reply. The condition being in its terms applicable to all cases in which dogs are carried, its reasonableness or otherwise must be considered in reference to all cases and not only to the circumstances of the particular case. The evil at which the Railway and Canal Traffic Act, 1854, s. 7, was aimed was the attempt to impose unreasonable conditions on the public at large.

Cur. adv. vult.

Dec. 15. The following judgments were delivered:—

LORD ESHER, M.R. The question in this case is whether the defendants are liable for damage occasioned to the plaintiff's dog through the negligence of their servant to a greater extent than 2*l.*, the amount paid into court. The person who delivered the dog to the company for carriage signed a ticket containing certain terms with regard to the carriage of dogs, upon which the defendants rely. The county court judge held those terms to be unreasonable, and, assessing the damage done to the dog at 25*l.*, he held that the defendants were liable to the extent of 23*l.* in addition to the amount paid into court. The Divisional Court reversed his decision. Having regard to the views expressed by the learned judges below, this Court has felt it necessary to consider the case with great care, but after such consideration we have arrived at the conclusion that their judgment should be reversed.

(1) 2 B. & S. 122; 29 L. J. (Q.B.) 209.
(2) 5 Ex. D. 190.
(3) 3 H. & C. 337.
(4) 34 L. J. (C.P.) 234.
(5) 33 L. J. (Ex.) 155, 157.

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The first question that arises is whether the company were liable as common carriers in respect of the carriage of dogs. For the reasons which will be presently given by my Brother Lindley, I am of opinion that they were not bound by the common law to carry dogs, and, therefore, if there had been no legislation on the subject, they could have made any terms they pleased with regard to the carriage of dogs. The case, however, does not seem to me to depend on the common law liability of the company, but on statutory enactments. By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), provision is made for the regulation of traffic on railways and canals, and by s. 1 "traffic" is to include "animals." The 2nd section provides that the company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic, and by the 3rd section a remedy was provided where such reasonable facilities were withheld by application to the Court of Common Pleas, whose jurisdiction in such matters has since been transferred to the Railway Commissioners. Therefore it appears to me that the defendants are bound by statute to afford reasonable facilities for carrying, among other animals, dogs. Then by s. 7 of the Act it is provided that the company shall be liable for the loss of or any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being thereby declared void. If the section stopped there the company would be bound to carry dogs for hire, but not, I think, as common carriers. I think their liability would be that of bailees for reward, and such liability could not be affected or limited by any notice, condition, or declaration they might make or give. But then there comes a proviso to the effect that nothing contained in the Act shall be construed to prevent the company from making such conditions with respect to the receiving, forwarding, and delivering any of the said animals, articles, goods, or things as shall be adjudged by the Court or judge before whom any question relating thereto shall

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be tried to be just and reasonable. Inasmuch as the Act declares that primâ facie all such conditions are to be null and void, it seems to me that it lies on the company to shew that any condition upon which it may rely is just and reasonable. If the case is tried before a judge and jury I think it is for the judge to say whether the condition is reasonable, although, I think, if he needs any assistance with regard to facts material for the determination of that question, he may ask the jury to find such facts. But, where there are no special facts in question, it is for the judge to say upon the construction of the condition, bringing to bear his knowledge of the world, whether it is just and reasonable. In the present case there was no evidence of any special circumstances. One of the judges in the Court below seems to have thought that there were special risks and difficulties involved in the carriage of dogs, e.g., that dogs were exceptionally liable to be stolen. I cannot assume in the absence of any evidence that a dog is peculiar in that respect, or that there is any special danger of theft in the case of a dog where reasonable care is taken. Therefore, as it seems to me, the judge was to determine whether the condition was reasonable upon the construction of its terms without evidence of any circumstances peculiar to dogs as compared with other animals. What, then, is the nature of the condition? It is, as it appears to me, a condition of the most violent description. It absolutely absolves the company from liability for any negligence of themselves or their servants however gross, and for wilful misconduct or dishonesty of their servants. Anything more violently stringent there could not be. Superior authority, by which I am bound, has held that, if a reasonable alternative is given to the customer by which, instead of accepting these harsh terms, he can pay a higher rate and have his goods carried upon the terms of the ordinary liability, even such a sweeping exemption from liability may be reasonable.

The question is, therefore, whether there is such an alternative here. The company say that they will be liable to the ordinary liability of bailees for hire up to the amount of 2*l.*, but beyond that sum they will not be liable, unless a percentage of 5 per cent. upon the value of the dog is paid. The condition appears to be a notice to the public in general, applicable to the case of

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all persons for whom dogs are carried, and I think, therefore, we have to see whether it is reasonable as applied to all cases to which it is applicable. In this particular case the dog was to be carried for a long distance. The ordinary fare would be 6*s.*, but, if the percentage was paid on the value of this dog, the fare would be 3*l.* 4*s.* The excess over the ordinary fare may be looked at in two ways. If it is treated as a premium of insurance, the company must be looked on as contracting to insure the dog; and then the consideration at once arises that such a contract would be invalid as being ultrà vires, and could not be enforced against the company; and therefore, in that point of view, the consideration for the excess payment fails and the condition is obviously unreasonable. On the other hand, if the excess payment is treated as extra fare, how does the case stand? The fare for the carriage of a dog of the value of 60*l.* for the distance in question would be more than that for the carriage of a passenger in a first-class carriage for the same distance with all the liabilities attaching to the carriage of a passenger. On a short journey the same consideration would apply to a much greater extent. It is obvious to me that no person wanting to have a dog carried could submit to these terms. The cases seem to me to establish that an alternative which no reasonable person could possibly adopt is for this purpose no alternative at all. In effect, therefore, what the company do in the case of dogs, which they are bound by statute to carry on reasonable terms, is to say that they will not carry them except on the terms of being subject to no liability whatever beyond 2*l.*, and to give no alternative. The cases decide that, if no alternative is given, such terms are unreasonable. For these reasons I think that this condition was unreasonable, and therefore that the decision of the Court below should be reversed.

LINDLEY, L.J. In order to decide the question thus raised, it is, in my opinion, necessary to ascertain at the outset whether the company is bound to carry dogs and, if it is, upon what terms, where there is no express contract determining them. If the railway company can lawfully refuse to carry dogs at all, it seems to me to follow that any terms on which it may choose to

carry them are in the nature of concessions on the part of the company, and that no terms on which it may choose to carry can be pronounced unreasonable. In the case supposed there is no standard of reasonableness or unreasonableness; and if any particular terms were objected to or were held unreasonable, the railway company would still be masters of the situation, and be able lawfully to refuse to carry on any other terms. A judicial decision that a particular set of terms was unreasonable would, in the case supposed, be of little practical use, and would afford no protection to the public, as the action of the Court could always be paralyzed by a refusal on the part of the railway company to carry. Unless, therefore, the railway company is bound to carry upon some terms, no contract of carriage can, in my opinion, be declared invalid on the ground of its being unreasonable. I proceed, therefore, to inquire whether the defendants here can lawfully refuse to carry dogs from London to Newcastle, and in order to determine this question it is necessary to see how a duty to carry can arise apart from express contract. Such a duty can only arise in one of two ways: first, by being a common carrier; and, secondly, by virtue of some statute.

At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify.

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At common law, therefore, it seems to me the defendants can lawfully refuse to carry dogs except upon their own terms.

Passing now to the various statutes relating to railway companies, there are very few enactments which in plain and distinct terms impose upon companies the duty of carrying any particular things. They are bound to carry troops (7 & 8 Vict. c. 85, s. 12), and mails (36 & 37 Vict. c. 48, s. 18), but until the passing of the Railway and Canal Traffic Act, 1854, the duty of railway companies to carry any particular class of goods depended upon whether they did or did not profess to carry such goods as common carriers. The Railways Clauses Consolidation Act, 1845, did not impose on railway companies any duty to carry goods of which they were not common carriers by reason of their own conduct and profession. This was decided by *Johnson* v. *Midland Railway Company* (1), and was recognised as clear and settled law by Vice-Chancellor Wood in *Hare* v. *London and North-Western Railway Company*. (2) The Railway and Canal Traffic Act, 1854, materially altered the law in this respect, for it enacts by s. 2 that every railway company shall afford all reasonable facilities for receiving, forwarding, and delivering traffic; and by s. 1 the word "traffic" includes passengers and their luggage, and goods, animals, and other things. This Act imposes on railway companies the duty to afford reasonable facilities for carrying all passengers, goods and animals. There may be an exception in the case of specially dangerous goods (see the Railways Clauses Consolidation Act, 1845, s. 105), but these are not now in question. The duty thus imposed on railway companies is inconsistent with their right to refuse to carry any particular class of goods or animals which they have facilities for carrying, and is inconsistent with their right to refuse to carry such goods or animals except upon terms which are unreasonable. The machinery for enforcing this duty is provided by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), to which it is unnecessary to allude further on the present occasion. The important point is that railway companies are bound to carry goods and animals which they have facilities for carrying. It would, however, be a mistake to suppose that railway companies are bound to carry as common carriers

(1) 4 Ex. 367. (2) 2 J. & H. 80.

everything which they can be required to carry under the provisions of the Railway and Canal Traffic Act, 1854. Railway companies are bound by that Act to provide reasonable facilities for carrying passengers, but they are not common carriers of passengers. So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do or profess to do with respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade* v. *North-Eastern Railway Company*. (1)

In the case now before us the defendants are not common carriers of dogs, and are not bound to carry dogs at their own risk. But the defendants are nevertheless bound to provide reasonable facilities for carrying dogs, and are, in other words, bound to carry them at reasonable times and on reasonable terms. This brings me to the consideration of s. 7 of the Railway and Canal Traffic Act, 1854, and the application of that section to the facts of the case. The section itself must be construed in conformity with the principles finally settled by the House of Lords in *Peek* v. *North Staffordshire Railway Company*. (2) According to that decision, not only must conditions made by a railway company be just and reasonable in the opinion of the Court and judge before whom any question relating to them shall be tried; but also contracts signed by the senders of goods must be just and reasonable in the opinion of the same tribunal. Further, it was held in that case, and again in *Ashendon* v. *London, Brighton, and South Coast Ry. Co.* (3), that a contract or condition exempting a railway company from all liability in respect of goods unless their value was declared and an additional payment made was unreasonable. In *Peek* v. *North Staffordshire Ry. Co.* (2) the goods were marble mantel-pieces. In *Ashendon* v. *London*,

(1) 1 C. B. (N.S.) 454, at p. 498.
(2) 10 H. L. C. 473.
(3) 5 Ex. D. 190.

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Brighton, and South Coast Ry. Co. (1) the thing sent was a dog. As regards horses, cattle, sheep and pigs, however, s. 7 of the Railway and Canal Traffic Act, 1854, contains a proviso which itself limits the liability of railway companies to certain specified sums unless the sender of such animals declares them to be of higher value than those sums; in which case the railway companies may demand a reasonable percentage upon the excess of the value so declared above the specified sums. This proviso does not apply to dogs, but it does not follow that a similar principle may not be applied to dogs by special contract.

The first branch of the proviso shows that as regards the animals specified a railway company is not liable in respect of horses, &c., the value of which is not declared beyond the specified amounts, even although the horses, &c., are injured by the negligence or even wilful misconduct of the company's servants. The proviso is express "that no greater damage shall be recovered, &c." and there is no qualification or exception with reference to the cause of injury. The second branch of the proviso authorizes a percentage on the value declared without reference to the distance to which the animals are carried; but the percentage must be reasonable. At the same time no test of reasonableness is given. The particular contract with which we have to deal clearly indicates to the sender that the railway company are not common carriers of dogs, and that he can send his dog at his own risk beyond the amount of 2*l.*, or that he can insure it against risks arising from the negligence or misconduct of the company's servants, if he chooses to declare its value and pay 5*l.* per cent. on the excess of its value above 2*l.* The contract does not say in terms what risks the company take upon themselves if the higher percentage is paid, but the construction of it is reasonably plain and is to the above effect.

The learned county court judge, who has held the contract unreasonable, has done so mainly on the ground that it did not afford a bonâ fide option, intelligible to the public, to send dogs at reasonable alternative rates. I am not sure that I quite understand his view on this point; it seems to me that the ticket gives the alternative already stated. It is very true that the company

(1) 5 Ex. D. 190.

will not on any terms carry dogs at their own risk to the same extent as they would be compellable to carry them, if the company were common carriers of dogs; but they are not compellable to carry dogs as common carriers either by their own profession or by virtue of any Act of Parliament. The contract in question is a printed form applicable indiscriminately to all senders of all dogs by all trains and to all places to which the company agree to carry dogs. This circumstance justifies the Court in looking to the contract not only with reference to the plaintiff but also with reference to its reasonableness to the public generally. It is not like a special contract which is not a common form. Being what it is, I do not think that the company can rely, in this particular case, on s. 15 of their Special Act of 1850, or, in other words, on the fact that the dog was sent by a fast train, and to a place beyond the limits of the company's own line. There is no evidence that the company would have carried the dog at all on any other terms, and in the absence of such evidence the circumstances to which I have alluded are, in my opinion, immaterial.

The only points remaining for consideration are the reasonableness of the limit of 2*l.* and of the charge of 5 per cent. 2*l.* is a small sum for a valuable dog, and 5 per cent. is a large sum on a large amount. But 2*l.* is the sum fixed by statute as the measure of liability for a sheep or pig, the value of which is not declared, and it appears to me reasonable for dogs. So far as I know, dogs in general are not more valuable than sheep or pigs in general. On this point the statute itself affords a guide.

The real difficulty turns on the 5 per cent. demanded for more valuable animals. Here the statute is no guide except that it shews that a percentage may be reasonable irrespective of distance. But, although a small percentage may be reasonable irrespective of distance, it by no means follows that the same is true of a high percentage. A charge of 5 per cent. is high enough to cover a total loss of one dog in every twenty, and appears excessive, although no doubt the risk of theft increases with the value of the dog. In the absence of evidence to shew that such a charge is reasonable, I am unable to hold it to be so. Possibly the defendants might have adduced evidence to shew that 5 per cent. was a

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reasonable sum to charge; but, although the defendants knew that the contract signed by the plaintiff would not bind him unless it was reasonable, they produced no evidence on this point. The burden of shewing that a contract of this sort is reasonable is thrown by the statute on the defendants, as was pointed out by Lord Cranworth in *Peek* v. *North Staffordshire Ry. Co.* (1), and by Lord Blackburn in *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (2)

The Divisional Court has held 5 per cent. to be reasonable without any evidence to shew that it is so. Upon this point I am unable to agree with them. Five per cent. is so large a sum as in my opinion to require evidence to shew that it is reasonable. The appeal ought therefore, in my opinion, to be allowed.

LOPES, L.J. The facts which are set out in this special case raise an important question with regard to the liabilities of railway companies as carriers, and the extent to which such liabilities may be qualified by the 7th section of the Railway and Canal Traffic Act, 1854.

I will first consider the position and liabilities of railway companies as carriers before the passing of the Railway and Canal Traffic Act, 1854.

Generally railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them. In 1830 the Carriers' Act was passed for the protection of common carriers against the loss of or injury to parcels delivered to them, the value and contents of which were not declared. In 1845 the Railway Clauses Act was passed. Sect. 86 of that Act is permissive, and railway companies are not as such bound to be carriers, and s. 89 provides that nothing in the Act contained is to make railway companies liable further or in any other case than they would have been liable as common carriers. So that up to 1854, railway companies, unless compelled

(1) 10 H. L. C. 473. (2) 2 B. & S. 122.

by some statute, could have refused to carry dogs or any other traffic which they did not profess to carry and did not generally carry, as common carriers, and no action would lie to compel them.

Two important matters are aimed at and hit by the Railway and Canal Traffic Act, 1854. It provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ("traffic" by the interpretation clause including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners.

Since the passing of that Act railway companies cannot in my opinion absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liabilities of ordinary bailees, and subject to reasonable conditions limiting that liability.

Applying that principle to the present case, I am of opinion that the defendants were not common carriers of dogs and were not bound to carry them at their own risk, but could not refuse to carry them on reasonable terms and subject to reasonable conditions.

Such being the position of railway companies with regard to dogs, I proceed to consider the 7th section of the Railway and Canal Traffic Act, 1854, under which section the defendants claim to be exonerated from liability beyond 2*l*. Admittedly the dog was injured by the carelessness of a servant in the defendants' employ, and admittedly the value was far in excess of 2*l*. The defendants are liable therefore to compensate the plaintiff for the full value of the dog, unless exonerated by the special contract which they set up under the 7th section of the Railway and Canal Traffic Act, 1854. If the terms on the ticket sought to be imposed by the defendants are reasonable, the defendants are protected; if they are not, the defendants are liable to pay to the plaintiff the value of his dog. It is for the defendants to make out that the terms they have sought to impose are reasonable: no evidence was given by them: the Court must therefore

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form its opinion by construing the notice, which is in writing, and determine for itself whether the terms are reasonable.

When the Railway and Canal Traffic Act was passed the law in respect to the liability of carriers had been much relaxed, and the weight of the decisions at that time established that carriers might by special notice make contracts limiting their responsibility even in cases of gross negligence, misconduct, or fraud on the part of their servants. The legislature thought that the companies took advantage of these decisions to evade the salutary policy of the common law, and accordingly intervened and passed the Railway and Canal Traffic Act, 1854.

The 7th section is the material section, and in that section the legislature says in effect that any terms or conditions purporting to free a railway or canal company from responsibility for the negligence of their servants are void unless they are adjudged reasonable by a judge or a Court. In determining whether the terms imposed by the defendants on the conveyance of dogs are just and reasonable, it is material to consider whether such terms are to be regarded in their general application to the public or only in their application to the conveyance of this particular dog from London to Newcastle. At first I was inclined to think the Court must look at the terms in the abstract as affecting this particular contract between the plaintiff and the defendants, and not in their general application to the public. Having regard, however, to the fact that the terms are contained in a printed notice and are used indiscriminately whatever the ordinary fare may be, and whether the distance is long or short, I am of opinion that the reasonableness of the terms must be determined with reference to the public at large, and not with reference to the conveyance of this particular dog from London to Newcastle. It is clear to my mind that there is nothing unjust or unreasonable in the *form* of the terms, or perhaps I should say mode of contracting. It is the form expressly authorized by the legislature in the case of horses, neat cattle, sheep, and pigs. The 7th section of the Railway and Canal Traffic Act has been held to extend to all animals, although the limitation of particular amounts of damages is confined to those animals expressly named in the proviso. I have no doubt, however, but that the legislature intended special

contracts limiting liability in respect of other animals to be framed on the same lines, and, mutatis mutandis, to be similar to those expressly provided for. So far there is nothing unjust or unreasonable in the form of the terms imposed by the defendants. But on other grounds I am of opinion that the terms are unjust and unreasonable. To be just and reasonable they should not be oppressive, excessive, nor deterrent. What is the position of the owner of the dog in this case? He has a dog of the value of 60*l.* which he wishes to send from London to Newcastle. Practically the defendants have a monopoly and he must send it over their railway. They say to him, we will carry your dog and, if any harm happens to it, or if it is lost, even by the negligence, wilful misconduct, or dishonesty of our servants, we will only pay you 2*l.*, unless you declare its value at 60*l.* and pay in addition to 6*s.* (the ordinary fare of the dog) a percentage of 5 per cent., i.e., 2*l.* 18*s.*, which with the ordinary fare of 6*s.* would make the cost for the carriage of that dog 3*l.* 4*s.* The fare of a first-class railway passenger from London to Newcastle is 1*l.* 18*s.* 3*d.*, so that the dog would cost one third more than a human being conveyed over the same distance in a first-class railway carriage, where the liability for negligence would be unlimited. It is to be observed, too, that 6*s.* is the ordinary fare for the carriage of the dog, and the additional charge is just ten times the ordinary fare. There are many other illustrations which might be suggested. Take a short journey of twenty miles, where the ordinary fare of the dog would be at the most 1*s.* 6*d.* The dog is worth 10*l.* The owner wishes to secure himself against the neglect, misconduct, or dishonesty of the servants of the defendants. To effect this object he must pay 8*s.* extra, that is 9*s.* 6*d.* for his dog, or be satisfied in case of loss or damage to recover 2*l.* This would be a higher charge for the dog than would be payable for a first-class passenger traversing the same distance where the liability was unlimited. In the case I have just stated, if the dog was worth 20*l.*, the extra charge would be 18*s.*, making together 19*s.* 6*d.*

In these circumstances it is, as I have said before, for the defendants to make out that the terms which they have sought to impose are reasonable. A condition exempting the carrier wholly from liability for the neglect and default of his servants

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is primâ facie unjust and unreasonable, but it is not of necessity so in every case. A carrier is bound to carry for a reasonable remuneration, and, if he offers to do so, but at the same time offers in the alternative to carry on the terms that he should have no liability at all, and holds forth, as an inducement, a reduction in the price below that which would be a reasonable remuneration for carrying at the carrier's risk, or some additional advantage, which he is not bound to give to those who employ him with a common law liability, a condition thus offered may be just and reasonable: *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown.* (1) These are no doubt cases where the railway companies are carrying as common carriers, but the same principle applies. Here there is no reasonable alternative offered, no bonâ fide practicable choice. The defendants say, liability of 2*l.* only or payment of 3*l.* 4*s.* The alternative is so heavily weighted as to be practically no reasonable alternative at all. In *Beal* v. *South Devon Ry. Co.* (2), Crompton, J., in delivering the judgment of the Exchequer Chamber, says: "The real question is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly," and again, Lord Blackburn in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown* (3) says, "in order to judge whether the condition is reasonable or not, you must look at this consideration. Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of the monopoly?"

I think the plaintiff in this case is entitled to say, the extra charge you impose on me is more than an equivalent for, and is out of proportion to, the extra risk you undertake in carrying a dog as valuable as mine, and on the other hand, if I do not pay the extra charge, 2*l.* is too small a sum to be a fair consideration for the responsibility from which you are exonerated. An extra charge of 5 per cent. on the declared value above 2*l.* seems unreasonable to those sending animals such as dogs by railway.

I regard the terms imposed as too onerous, and as practically making it compulsory on the customer to run the risk himself

(1) Law Rep. 8 H. L. 703. (2) 3 H. & C. 342.
(3) 8 App. Cas. 703, 711.

rather than incur the heavy cost of the additional payment, a cost far more than a fair equivalent for the extra risk undertaken by the defendants.

Much of the reasoning in *Peek* v. *North Staffordshire Ry. Co.* (1), is applicable to this case. In *Ashendon* v. *London, Brighton, and South Coast Ry. Co.* (2), the defendants sought to exonerate themselves from all liability without any limit, unless the additional charge was paid, and in that respect the case is distinguishable from the present case. For these reasons I think the terms imposed by the defendants unjust and unreasonable, and therefore void.

The decision of the Divisional Court must be reversed, and this appeal allowed. There will be judgment for the plaintiff for damages, 23*l.* over and above the 2*l.* paid into court.

Appeal allowed.

Solicitor for plaintiff: *Titley, for Dix & Warlow.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

E. L.

[IN THE COURT OF APPEAL.]

Dec. 18.

SHAW *v.* SMITH AND OTHERS.

Practice—Discovery—Inspection of Property—Order L., r. 3, *Order XXXI., r.* 12—*Inspection as between co-Plaintiffs or co-Defendants.*

Order L., r. 3, provides that it shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein.

Claims being made against two defendants severally in the same action:—

Held, that under the above-mentioned rule inspection could not be granted to one defendant of property belonging to another defendant when there was no right in question as between them in the action.

Brown v. *Watkins* (16 Q. B. D. 125) explained.

APPEAL from an order of the Queen's Bench Division affirming an order of Field, J., at Chambers, whereby he gave leave to the defendant Smith to inspect certain mines belonging to the other defendants.

(1) 10 H. L. C. 473. (2) 5 Ex. D. 190.

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The facts appeared to be as follows:

The action was against Smith, Sir Joseph Whitwell Pease, and Pease & Partners, Limited. By an indenture dated the 31st of December, 1864, the defendant Smith granted to Joseph Pease, since deceased, and the defendant Sir J. W. Pease, all the ironstone and iron-ore, and all the mines, seams, beds, veins, and strata thereof, lying under a certain piece of land, containing forty-seven acres or thereabouts, together with liberty to win, work, and get the same, and to do so, if they should think fit, without leaving any pillars or other support for the surface, making compensation as by the said indenture provided for surface damage and damage to then existing houses, buildings, and erections, and also for the exercise of certain rights, powers, and liberties over, under, and upon the said land (including the right of working and getting the said ironstone and iron-ore) which were by the said indenture granted to the said Joseph Pease and Sir J. W. Pease. Afterwards by an indenture dated the 3rd of July, 1871, the defendant Smith granted a portion of the said piece of land to the plaintiff in fee, reserving and excepting all mines of ironstone or iron-ore under the same. The last-mentioned indenture contained the usual covenants by the defendant Smith for title and quiet enjoyment. It appeared that the Peases were lessees from a person other than the defendant Smith of mines under lands adjoining the before-mentioned forty-seven acres. The defendants Pease & Partners, Limited, were the assigns of the mines and minerals before mentioned from Joseph Pease and the defendant Sir J. W. Pease. The statement of claim alleged that the defendants, Sir J. W. Pease and Pease & Partners, Limited, had, since the 3rd of July, 1871, removed iron-ore or ironstone from beneath the said land of the plaintiff and from beneath land adjoining the said land of the plaintiff, part of which was land other than the before-mentioned forty-seven acres, and thereby, and by the exercise of the aforesaid rights, powers, and liberties under and upon the said forty-seven acres, let down, cracked, and injured the said land of the plaintiff, and a house (which, it appeared, had been erected thereon by the plaintiff subsequently to the conveyance of the 31st of December, 1864), and that no compensation had been made to

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the plaintiff in respect of the said damage. The plaintiff claimed against the defendants, Sir J. W. Pease and Pease & Partners, Limited, in respect of the damage so occasioned, and also claimed damages against the defendant Smith as for a breach of the covenant for quiet enjoyment.

No statement of defence had as yet been made.

The defendant Smith applied under Order L., r. 3, for liberty to inspect the mines of the other defendants, Pease & Partners, Limited, both under the plaintiff's land and the adjoining lands, the object being to prove that it was not by the workings under the plaintiff's land or any part of the land which belonged to Smith, but by workings under the other adjoining lands, that the damage had been done.

Field, J., made an order giving him liberty to make such inspection. On appeal to the Divisional Court (Manisty, J., and Grantham, J.), the order was affirmed, though the former learned judge was disposed to think that it was not rightly made.

The defendants Pease & Partners, Limited, thereupon appealed from the decision of the Divisional Court.

Manisty, for the appellants. There is no power under Order L., r. 3, to order inspection of property belonging to one defendant by another defendant, when there is no question of right at issue between the two defendants in the action, as is the case here. The plaintiff's claims against the two sets of defendants are really alternative claims. If the plaintiff had brought separate actions against the two sets of defendants, instead of combining both claims in one action, it is clear that this order could not have been made, for the rule cannot be construed as giving power to order inspection as against a person not a party to the action. The rule does not enable one defendant to get inspection from another defendant merely for the purpose of obtaining evidence. There is only power to order inspection as between opposite parties: *Brown* v. *Watkins*. (1)

Wilberforce, for the defendant Smith. The terms of Order L., r. 3, import no such restriction of its meaning as is suggested. The order may be made on the application of any party to a cause or

(1) 16 Q. B. D. 125.

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matter against any party to such cause or matter. There is no reason why the order should not be made as between two defendants, both being parties to the action. Why should the words of the rule be artificially limited so as to exclude this case, if it is just that there should be this inspection, as it is contended that it is under the circumstances? It is not clear that there cannot be any matter at issue between the defendants, for, there being a right to compensation for surface damage reserved to the defendant Smith in the conveyance of the mines under the plaintiff's land, if the plaintiff recovers against Smith, the latter may have a claim over against the other defendants in respect of the right to compensation so reserved. The decision in *Brown* v. *Watkins* (1) turned on different language from that of Order L., r. 3.

Dodd, appeared for the plaintiff, but did not argue.

Manisty, in reply.

LORD ESHER, M.R. In this case the plaintiff is suing Smith for breach of a covenant for quiet enjoyment, and the other defendants for letting down his surface by working their mines. The defendant Smith has applied for and obtained an order for the inspection of the mines of the other defendants under the plaintiff's land and the lands adjoining thereto. It is contended on appeal against that order that the Court has no jurisdiction to make such an order for inspection by one defendant against another defendant either in respect of the mines under the forty-seven acres or in respect of the mines under the adjacent land. The first question is, what is the proper construction of Order L., r. 3?

It appears to me that Field, J., and Grantham, J., must have considered the terms of this order wider than those of Order XXXI., r. 12, for I cannot suppose that either of those learned judges would have considered himself authorized to overrule the case of *Brown* v. *Watkins*. (1) But I must say that I can see no real distinction between the language of the two orders. It must be remembered in construing these rules that they are applicable to cases in the Chancery as well as in the Queen's Bench Division. Order L., r. 3, says, that it shall be lawful for the Court or

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a judge upon the application of "any party" to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property, &c. There is, it may be observed, no such expression here as "any other party." which is found in Order XXXI., r. 12. That order provides that "any party" may apply to the Court or a judge for an order directing "any other party" to any cause or matter to make discovery, &c. When it comes to be considered that these rules apply to the Chancery Division, it seems to me clear that it cannot be meant that the application under them must necessarily be as between a plaintiff and a defendant. In an action in the Chancery Division there may be many parties either plaintiffs or defendants. The language does not say that the application must be by a plaintiff against a defendant, or vice versâ. It says in Order XXXI., r. 12, that it may be by "any party" against "any other party." With regard to Order L., r. 3, though it is true that the rule does not say, as Order XXXI., r. 12, does, that the application is to be by "any party" against "any other party," yet it seems to me that it must be against some other party in the cause, and, if so, the expressions used in the two rules both come to the same thing. But in neither case does it necessarily follow that the application must be as between plaintiff and defendant. It appears to me that, with regard to the question now before us, the construction of both the rules must be the same. I think that the case of *Brown* v. *Watkins* (1) was rightly decided, though there is a phrase used in the judgments in that case, which, if unexplained, might possibly lead to a misapprehension. I think, however, that the meaning which I should give to that phrase is perfectly consistent with the decision. The judges there use the expression "opposite party." That may be construed to mean that the application must be as between plaintiff and defendant. But in the Chancery Division it may often be necessary to adjust rights in the action between two plaintiffs or two defendants, and I should construe the passages of the judgments in *Brown* v. *Watkins* (1), where it is said that the application must be against an opposite party, as meaning not that it must in all cases be by plaintiffs against defendants or

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vice versâ, but that it must be by and against parties between whom there is some right to be adjusted in the action. Taking that to be the true construction of Order XXXI., r. 12, it appears to me to be just as applicable to Order L., r. 3, and I think that, under that rule also, there may be inspection, not only as between plaintiffs and defendants but as between two defendants, if there are rights which have to be adjusted between them in the action, and to which such inspection is material. To apply that construction of the rule to the present case: here the action is against Smith for breach of the covenant for quiet enjoyment in respect of the land which he conveyed to the plaintiff, and against the other defendants in respect of workings under the forty-seven acres, and also under other adjacent lands. Let us consider the question first with regard to the workings of the other defendants under the adjacent lands. Smith cannot be liable in respect of those workings upon his covenant for quiet enjoyment, so with regard to those two causes of action there can be no rights to adjust as between Smith and the other defendants in the action. The only object Smith can have in seeking for inspection is to shew that the workings which caused the mischief were workings not under the plaintiff's land or any part of the forty-seven acres, but under the adjoining lands, for which he is not responsible, and therefore that he cannot be liable for any breach of the covenant for quiet enjoyment. He seeks to defend himself from liability by shewing that the mischief has not been caused by any acts for which he is responsible, but so far there is no right to adjust as between himself and the other defendants. But then with regard to the alleged workings under the forty-seven acres, it was suggested that, if the mischief was done by those workings, there might be some right to adjust between the defendants as to them. The matter is a little more complicated with regard to this point, but I apprehend that it stands thus. Before the conveyance to the plaintiff, the defendant Smith conveyed the mines to the Peases with a right to work them without leaving support subject to a right to compensation if the surface was let down. He could not give the plaintiff any rights in derogation of the rights of working so given; but, when he conveyed the surface to the

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plaintiff, the right of compensation in respect thereof, as it seems to me, passed from Smith to the plaintiff, and in any case there does not appear to be any right to compensation remaining as between Smith and the other defendants. So, as it appears to me, there are not any rights to be adjusted in the action between Smith and the other defendants. There cannot therefore be any question as between them to which the inspection ordered can be material. Therefore, reading the rule in accordance with the decision in *Brown* v. *Watkins* (1), as I have explained it, I do not think it gives the Court any jurisdiction to make this order as between the defendant Smith and the other defendants. The mere accident of their both being defendants in the same action does not, in my opinion, give that jurisdiction, where there is no right to be adjusted in the action as between them. For these reasons I think this appeal should be allowed, and the order for inspection rescinded.

LINDLEY, L.J. I am of the same opinion. The defendant Smith has obtained an order for inspection of the mines of the other defendants under the plaintiff's land and the land adjoining thereto: and the question is whether that order was properly made. He has no right or interest whatever in these mines, and no right, apart from the order, to inspect them: and the action is not one in which, so far as I can see, there is any right to be adjusted as between Smith and the other defendants. It appears to me that under these circumstances the order for inspection ought not to have been made. It is said that the Court had jurisdiction to make it under Order L., r. 3. No doubt the words of that rule are, looked at by themselves, large enough to cover this case, but I think we must look not only at the words themselves but also at the rights and position of the parties in order to see whether the rule gives any right to inspection in such a case as this. I cannot so read the rule. There are cases I think where one defendant may have a right to discovery or inspection of documents or property as against another defendant, there being rights to be adjusted between them to which such discovery or inspection is material; and it

(1) 16 Q. B. D. 125.

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would not be necessary in such a case to bring a fresh action in order to claim such discovery or inspection. But the right to discovery or inspection must have some foundation and must depend on some other right. It cannot exist, I think, apart from any community of interest or any question of rights to be adjusted between the parties. The mere fact that persons are co-defendants does not give the right, as it appears to me, in the absence of any community of interest or right to be adjusted between them.

LOPES, L.J. I agree. I think the Court below has given too wide an interpretation to Order L., r. 3. I do not think they had jurisdiction to make this order, inasmuch as there was no right that had to be adjusted as between Smith and the other defendants in the action. I am of opinion that there would be a right to discovery of documents or inspection as between parties who were co-plaintiffs or parties who were co-defendants, where rights had to be adjusted between them in the action. In this case there are, so far as I can make out, no rights to be adjusted between the defendant Smith and the other defendants. With regard to the decision in *Brown* v. *Watkins* (1), I agree that the expressions there used may perhaps lead to misapprehension. I think that by "opposite parties" the Court must have meant parties between whom some question was in conflict in the action. Subject to that observation I entirely agree with the decision in that case.

Appeal allowed.

Solicitors for the plaintiff: *Pitman & Sons, for Buchannan & Richardson.*

Solicitors for the defendant Smith: *Jackson & Co., for Jackson & Jackson.*

Solicitor for the defendants Pease Partners, Limited: *R. S. Jarvis.*

(1) 16 Q. B. D. 125.

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 18, 20.

GOWAN *v.* WRIGHT.

Practice—Judgment—Judge's Order by Consent—Failure to file Order, Effect of —Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 27—*Judgment not void as against Judgment Debtor.*

The 27th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), provides that a judge's order for judgment made by consent of the defendant in a personal action shall be filed in the Court of Queen's Bench in the manner required by the section within twenty-one days after the making thereof, "otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void":—

Held (by Lord Esher, M.R., and Lindley, L.J., Lopes, L.J., dissenting), that the effect of non-compliance with the requirements of the section is only to render such an order and judgment void as against the creditors of such defendant, but not as against himself; and, therefore, that a defendant who had consented to such an order could not get the judgment signed upon it set aside on the ground that the order had not been filed in accordance with the section.

APPEAL from an order of the Queen's Bench Division setting aside a judgment under the following circumstances:

The defendant in an action for money lent consented to a judge's order for judgment for the sum of 813*l.* 13*s.* 9*d.*, and costs to be taxed, on the terms that the judgment was not to be signed if the defendant paid 200*l.* and the taxed costs by monthly instalments of 10*l.* each, and that certain promissory notes and documents should be given up to the defendant by the plaintiff. The plaintiff handed over the documents accordingly. The defendant paid two of such instalments, but made default in payment of the third, and thereupon the plaintiff signed judgment for 793*l.* 13*s.* 9*d.*, the balance of the original debt and costs. The judge's order not having been filed pursuant to the 27th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), the defendant applied to a judge at chambers to set aside the judgment as being avoided by that section. The judge referred the matter to the Court. The Divisional Court (Huddleston, B., and Manisty, J.), held that the judgment was void, and ordered it to be set aside.

Jelf, Q.C., and *G. Henderson*, for the judgment creditor. The 27th section of the Debtors Act, 1869, is in substance merely a

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re-enactment of the 137th section of the Bankrupt Law Consolidation Act, 1849. It was held in *Bryan* v. *Child* (1) that the words "null and void" in that section meant void only as against assignees in bankruptcy, and that a judgment debtor who had consented to a judge's order for judgment could not avail himself of non-compliance with that enactment to defeat his own act. The same construction must apply to s. 27 of the Debtors Act, 1869. The cases of *Ex parte Brown* (2) and *Jones* v. *Jaggar* (3) are not authorities to the contrary, because the former was the case of a bankruptcy, and in the latter case the judgment was assumed to be void as against the judgment debtor, and this point was not argued. The case of *Bryan* v. *Child* (1) was not cited in *Jones* v. *Jaggar*. (3) It is clear that the 26th section, which provides in the case of warrants of attorney and cognovits that, if not filed, they shall be deemed fraudulent and shall be void, like s. 136 of the Bankrupt Law Consolidation Act, 1849, does not render such instruments void as against the judgment debtor himself. Why should there be any difference in this respect between warrants of attorney and cognovits and judge's orders for judgment by consent?

Charles, Q.C., and *R. O. B. Lane*, for the judgment debtor. The case of *Bryan* v. *Child* (1) is not an authority with regard to the construction of the present statute. In that case the section to be construed was contained in the Bankrupt Law Consolidation Act, 1849, and in a part of the Act which by the preamble thereto was confined to proceedings in bankruptcy, and the section was confined to trader defendants. The Act which contains the section at present in question does not relate to bankruptcy only, but to the abolition of imprisonment for debt and other matters, and the section applies to all persons. The object of the section is no doubt to protect creditors by ensuring that they shall have notice that the debtor has given his consent to a judge's order for judgment, and it is reasonable to suppose that in order to ensure such protection to creditors by the filing of the order the legislature have enacted that, unless the order is filed, it shall be void even as against the judgment debtor. Some provisions

(1) 5 Ex. 368. (2) 17 Q. B. D. 488.
(3) W. N. 1886, p. 108; 54 L. T. 731.

of the Bills of Sale Acts make bills of sale void even as against the grantor, if certain formalities are not complied with.

[LORD ESHER, M.R. Those enactments were passed for the protection of the grantor of the bill of sale.]

Jones v. *Jaggar* (1) and *Ex parte Brown* (2) are authorities to shew that this judgment is void as against the judgment debtor.

Jelf, Q.C., in reply. Compliance with the provisions of the section is sufficiently secured by the fact that, if the order is not filed, the judgment is void as against creditors.

LORD ESHER, M.R. In this case, a judge's order for judgment having been made by consent and judgment signed accordingly, the defendant, who gave that consent, seeks to set aside the judgment. The defendant does not pretend that the judgment is not a perfectly honest judgment against him, or that he was not originally liable in the action in respect of the sum for which he consented to judgment; he has voluntarily entered into this arrangement, and has had all the advantage that was to be got from it in the way of avoiding costs and otherwise; but he now turns round and claims to be entitled to break away from the terms he himself made, and to set the judgment aside on the ground of non-compliance with the provisions of the 27th section of the Debtors Act, 1869. He relies on the wording of that section as entitling him to do so. No doubt words are there used which, if read in their fullest sense, are sufficiently wide to support the defendant's contention: but the question is whether they are to be so read or some more limited construction is to be given to them, so as to prevent a person who has himself consented to a judgment from taking advantage of them to get it set aside. We have to consider what the legislature really intended by this language. When we look at the 12 & 13 Vict. c. 106, s. 137, we find that there the section uses the words "shall be null and void to all intents and purposes whatever." Those words are at least as large as the words of the section we are now considering; yet in the case of *Bryan* v. *Child* (3), the Court saw their way to limiting the interpreta-

(1) W. N. 1886, p. 108; 54 L. T. 731. (2) 17 Q. B. D. 488.
(3) 5 Ex. 368.

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tion of them. Is there, then, any general rule of construction applicable to such a provision which enables us to limit the meaning of the words so as to prevent the defendant from doing what he seeks to do? I find in Maxwell on the Interpretation of Statutes, p. 184, in a section headed, "Construction against impairing obligations or permitting advantage from one's own wrong," the principle resulting from the various authorities there collected expressed as follows:—"On the general principle of avoiding injustice and absurdity any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act or otherwise to profit by his own wrong." Of this the author gives many instances, amongst others, the decision on the statute 9 Anne, c. 14, by which it was held that, although that statute enacted that bills and notes founded on the consideration of money lost at play should be "utterly frustrate, void, and of none effect to all intents and purposes," yet its operation was confined to preventing the drawer or any person claiming under him from recovering from the loser, and it left the instrument unaffected in the hands of an innocent indorsee for value suing the drawer, the reason for so limiting the words being the gross injustice that would otherwise be occasioned to an innocent indorsee. Again, he refers to the Acts of Elizabeth by which leases by ecclesiastical persons and bodies other than for twenty-one years or three lives were made "utterly void and of none effect to all intents, constructions, and purposes," and to the decisions by which nevertheless the prohibited leases were held valid as against the lessor when a corporation sole and even when a corporation aggregate with a head during the life of its head. Then again, coming closer to the case now in question, he refers to the decision in *Bryan* v. *Child* (1), with regard to the 137th section of the Bankrupt Law Consolidation Act, 1849, which provided, as I have already said, that a judge's order for judgment made against a trader with his consent should, if not filed, be "null and void to all intents and purposes whatever:" and yet the words were limited and were construed as making the judgment void only as against his assignees but not as against himself.

(1) 5 Ex. 368.

Pollock, C.B., there says in giving judgment: "In the present case to treat the document as fraudulent against the party himself who has signed it with full knowledge of its effect, a document too by which he does a mere act of justice by allowing his creditor to issue execution, and that without himself being put to the costs of a suit, would be so absurd that, unless we have the positive expression of the legislature that such was meant to be the case, it is impossible for us to assume any such intention." In that view it became necessary for him to look to the terms of the Act and to consider whether they amounted to such a positive expression of the legislature; and the learned Chief Baron held that, although the words in the section then under consideration were, like those of the section we are considering, if looked at by themselves, large enough to cover the case, yet nevertheless there was no such positive expression of the legislature. Alderson, B., in giving judgment, says: "On looking to the words of the statute there appears to be no necessity for arriving at the grievous absurdity of allowing a person to set aside his own deliberate act." He vouches the same principle and examines the Act to see whether the expression of the legislature there is so positive that the Court cannot escape from such an absurdity and comes to a conclusion in the negative. So again Rolfe, B., says: "My Lord has adverted to the statutes of Elizabeth respecting ecclesiastical leases. Nothing can be stronger than the words used in those statutes, which declare that leases not authorized by them shall be utterly void and of none effect to all intents, constructions, and purposes, any law, usage, or custom to the contrary notwithstanding. Still the Courts early said that such leases were not meant to be null and void as against the lessors; that the statute was made for the benefit of their successors: and that the leases were only void as against them." It seems to me that the principle of that decision, as applied to a statute very like that now before us, is that it is so unjust to allow a man to invalidate his own act, of which he has taken the advantage, that it is absurd to suppose that the legislature intended to allow him to do so; and therefore the Court are not to suppose that they did so intend unless actually compelled by the language used: and in that case the Court held

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that they were not so compelled by words quite as strong as those with which we have to deal. Applying the same principle to this case, let us consider the words of s. 27. The section provides that where its requirements are not complied with the judge's order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void.

If those words are to have their fullest effect given to them, a man, who does not deny his original liability, and consents to a judge's order to avoid costs, can take advantage of the failure to file the order, a matter which, as between him and the judgment creditor, does not affect the position of affairs in the least. The effect would appear positively to go as far as this, that after execution issued the judgment debtor could turn round and say that all the proceedings which had taken place with his consent were null and void, that there was nothing to support the execution, and, so far as I can see, that both the judgment creditor and the sheriff were liable to an action of trespass in respect thereof. If we can avoid arriving at such an extraordinary result, I think we ought to do so, and therefore we must consider the provisions of the Act to see if they compel us to hold that the judgment debtor's contention is correct. The Court of Exchequer, in *Bryan* v. *Child* (1), found, on considering the language of the Bankrupt Law Consolidation Act, 1849, not only that there was nothing to prevent them from construing the words as they did, but that there was something which assisted them in so doing. Similarly in this Act I think there is something which may assist us in construing this section as they did the section then under consideration. It has been said that this Act does not apply only to traders as the 12 & 13 Vict. c. 106, did. It has, however, followed as nearly as possible the same words, though the legislature must be taken to have known that an Act applying to traders had been construed in *Bryan* v. *Child* (1) in the limited sense which was there given to the words. I should be prepared to hold, as I understand Alderson and Rolfe, BB., to have been prepared to hold in *Bryan* v. *Child* (1), that, even in the absence of anything in the rest of the statute to assist us in arriving at that conclusion, the words must be limited as we pro-

(1) 5 Ex. 368.

pose to limit them, in order to avoid gross injustice and absurdity; but I think that in the present statute, as in the case of 12 & 13 Vict. c. 106, there are words that assist us. The previous section, s. 26, relates to warrants of attorney and cognovits. They also are instruments which are executed for the purpose of testifying to a person's consent that judgment should be entered against him; and there does not seem to be any reason why under similar circumstances the judgment debtor should not be allowed to get them set aside if he is allowed to set aside a judge's order by consent. In that section the Act of Geo. 4 "for preventing frauds upon creditors by secret warrants of attorney," is referred to, and it is provided that the same if not filed shall be deemed fraudulent and shall be void. It would be more than absurd to say that such an instrument should be deemed fraudulent as against a man who had consented thereto because it was not filed. It seems to me clear that it could not have been intended that under that section a man should be allowed to invalidate his own act. The Court in *Bryan* v. *Child* (1) derived assistance from similar terms in the 136th section of the 12 & 13 Vict. c. 106; and I think that the terms of the 26th section assist us in coming to the conclusion that the words of the 27th section ought to be limited in the same manner as were the words of the 137th section of 12 & 13 Vict. c. 106, in that case, for the purpose of preventing the injustice of a man's being allowed to impair the obligation of his own contract on such a ground as is here put forward. There are, as it seems to me, a long series of decisions with regard to similar expressions in many statutes establishing a principle of construction that enables us to limit the meaning of the words and to avoid attributing to the legislature the intention of bringing about such an absurd result as that contended for by the defendant; and in this particular case we are aided in the application of that principle by the words of the 26th section. For these reasons I think that this judgment ought not to be set aside, and that the appeal must be allowed.

LINDLEY, L.J. The question raised is whether the 27th section of the Debtors Act, 1869, which provides that in default of com-

(1) 5 Ex. 368.

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pliance with its requirements the judge's order and judgment shall be null and void, means that it shall be null and void as between the judgment creditor and the judgment debtor or merely as against the creditors of the judgment debtor. The first point which, as it appears to me, must be borne in mind is that the enactment of the 27th section is not an altogether new enactment; it is a reproduction of an older provision and one of a series of enactments all aimed at frauds upon creditors by means of such instruments as warrants of attorney, cognovits, and judge's orders. It would not be right, I think, under the circumstances to approach the section ignoring the whole previous history of the legislation on the subject. If we trace back such previous history, I think that the right construction of the section becomes plain. The object with which the legislature started, as declared in the older Act, 3 Geo. 4, c. 39, was to prevent warrants of attorney from being used to defraud creditors. That was the sole object, and there was nothing to shew that the instruments included in those provisions and the similar subsequent provisions were intended to be void against any other party than the creditors. Those provisions only relating to warrants of attorney and cognovits, the device was discovered afterwards by some ingenious person by which they might be evaded by means of a judge's order for judgment by consent. An example of this may be found in the case of *Bray* v. *Manson*. (1) That omission was afterwards set right by legislation, and accordingly the provisions of s. 137 made their appearance in the Bankrupt Law Consolidation Act, 1849, in order to meet the case that had thus been omitted. But the language of the section was somewhat different from that of the older enactments, and says that the judgments shall be null and void to all intents and purposes whatever. But the intention of the legislature was so plain, and the injustice of the contrary construction was so startling, that, when the Court had in *Bryan* v. *Child* (2) to consider the terms of the section, they held that it must have the same meaning as the provisions with regard to warrants of attorney and cognovits. It is true that there was a preamble to the Act of 1849, and a context which aided the construction, but two

(1) 8 M. & W. 668. (2) 5 Ex. 368.

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of the judges seem to have thought that, apart from that consideration, the construction adopted was the right one. In 1869 fresh legislation took place on the subject of bankruptcy, on the footing that except with regard to what constituted an act of bankruptcy there was no distinction between traders and non-traders, and it was also thought right that imprisonment for debt, as it had previously existed, should be abolished, and so the Bankruptcy Act, 1869, and the Debtors Act, 1869, were passed; and, for reasons which I do not know, the legislation as to warrants of attorney, &c., was put into the latter Act. We have in that Act reproduced with slight modifications the old provisions in relation to warrants of attorney and cognovits and judge's orders. There was a reason for altering the language, because in the older Act the provisions of these sections referred only to traders, but in the Act of 1869, the distinction between traders and non-traders having been abolished, except with regard to acts of bankruptcy, it was no longer proper to confine the operation of these sections to traders; and so the language was altered in that respect, and the instruments in question are in the event of non-compliance with the Act to be void whether the person giving them is a trader or not; but the question is whether they are to be void as against all persons or only as against creditors of the judgment debtor. There is no more reason that I can see than there was previously under the Act of 1849 why there should be any difference in this respect between warrants of attorney and cognovits and judge's orders. I felt a doubt at one time whether such an order as this was within the section. I was inclined to think that the section might only apply to an order made by consent in a non-contentious action, but I find that according to the case of *Farrow* v. *Mayes* (1) it would appear that the construction of this section must be wider; so I assume this judge's order to be within the 27th section. I agree that the true construction of the section must be that the judge's order and judgment are to be void as against creditors, not as against the judgment debtor himself. Having regard to the history of the legislation and the common sense of the matter, it seems to me impossible to make any distinction in this respect between warrants

(1) 18 Q. B. 516.

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of attorney and cognovits and judge's orders. It appears to me that, on referring to s. 26, the context shews that the same machinery was intended to apply to all these instruments. I cannot understand the expression "fraudulent" in the 26th section otherwise than as shewing that the object simply was to render the instruments void as against creditors of the judgment debtor; I do not say only as against trustees in bankruptcy but as against all creditors with whom the holder of the judgment comes into competition. On these grounds, I agree with the judgment of the Master of the Rolls.

LOPES, L.J. This is an application to set aside a judgment signed against the defendant on the 16th of September, 1884, on the ground that the requisites of the statute 32 & 33 Vict. c. 62, s. 27, have not been complied with.

I am sorry that I cannot agree with the judgment of the rest of the Court, but I am unable to do so, as I entertain a strong opinion that the judgment of the Divisional Court was right.

I will first call attention to the terms of s. 27, the material section. They have been so often referred to that it is unnecessary to read them at length. It is impossible to say that the words of the section do not cover the present case. The section declares in terms that are clear and unequivocal that a judge's order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment shall, if the provisions of the section have not been complied with, be void; not void as against any particular person, or class of persons, in exclusion of any other person or any other class of persons, but void generally, just as if the statute had said, "shall be waste paper."

When a statute has meant void only in a qualified way it has so said, as for instance in the statute 13 Eliz. c. 5, which says, "void as against persons whose action or suit is delayed," or in another instance where the legislature has said void "as against assignees." Here we are asked, in contravention of the plain and unambiguous language used, to say that "void" means not void against the party consenting to the order. To give so limited and unnatural a sense to the word, unless its interpreta-

tion in its ordinary meaning would lead to an obvious absurdity, would be in my opinion wrong and dangerous. I think that, where the legislature has used words of a plain and definite import, it would be wrong and very dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it has expressed. Why should the Court in this case give to the words used a meaning foreign to the meaning which those words ordinarily bear? No case decided on the statute in question can be cited as an authority for the forced construction contended for, but there are cases to which I shall have to refer presently favouring the construction which I put upon it. The case of *Bryan* v. *Child* (1) is relied on by the counsel for the judgment creditor. The 137th section of 12 & 13 Vict. c. 106, was the subject-matter of the decision in that case. That section declared that a judge's order made by consent, given by a trader defendant in any personal action, unless filed as thereby required, and the judgment and execution thereon, should be null and void to all intents and purposes whatever. The Court decided that such order was not avoided as against the trader himself but only as against his assignees, if he afterwards became bankrupt. The 12 & 13 Vict. c. 106, was an Act to amend and consolidate the laws as to bankruptcy, and from the 133rd to the 138th sections contains a code of law with respect to transactions with the bankrupt and executions against his property up to the time of the bankruptcy or within a limited time previously thereto, making it obvious that the 137th section applies only where the property of a bankrupt is distributable, and not to a case where the trader himself seeks to defeat his own act of consenting to a judgment.

The 32 & 33 Vict. c. 62, is an Act for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes. It does not deal with bankruptcy generally, that is dealt with by another Act: the section in question therefore does not apply to the state of things dealt with in *Bryan* v. *Child*. (1) The principle of the decision in *Bryan* v. *Child* (1) was, as I understand it, that the judge's order with the judgment and execution on it were not null and void to all

(1) 5 Ex. 368.

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intents and purposes, the party who consented to that order not having become bankrupt or liable to the bankruptcy laws. I do not think, therefore, that that case governs the present, which arises under a different statute and in a different state of circumstances.

Coming back to the 27th section of the statute in question, is there not good reason for thinking that the legislature intended, if the required formalities were not complied with, to make the consent order therein provided for absolutely void, not only as against third parties, but as against the party giving the consent? Obviously the object the legislature had in view was to protect creditors and those about to trust the debtor, and by the filing of the consent order, &c., to secure for them the opportunity of obtaining information as to the position of the debtor. Manifestly an effective way of doing this would be by making it incumbent on the parties to the proceeding to comply with s. 27. If the proceeding was to be void unless s. 27 was complied with, it would be essentially for the benefit of the judgment creditor, and in some instances of the debtor, to take the proper steps under s. 27. I cannot see that the judgment creditor has reason to complain. He fails to comply with the requirements of the Act and suffers accordingly. A comparison between the 26th and 27th sections was relied on by the counsel for the judgment creditor, because the words "shall be deemed fraudulent and shall be void" are used in the former section, and it was said it would be absurd that a man could say that he was fraudulent in respect to a matter to which he had consented. Assuming this, it appears to me that the omission of "shall be deemed fraudulent" in s. 27 is significant, and may indicate an intention by the legislature to draw a distinction between the cases provided for in the two sections.

Two cases were cited by the counsel for the judgment debtor in favour of the construction which I put upon the 27th section. The first is *Ex parte Brown*. (1) I do not think this case so much in point as *Jones* v. *Jaggar* (2), a case decided by Lord Coleridge, C.J., and Bowen, L.J., sitting as judges of the High Court. This is a clear and distinct authority against the contention for the

(1) 17 Q. B. D. 488. (2) 54 L. T. (N.S.) 731; W. N. 1886, p. 108.

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judgment creditor. The only objection made to that decision is that *Bryan* v. *Child* (1) was not cited. It may be that the learned counsel thought, as I do, that that case was inapplicable to the circumstances of the case before the Court.

I agree with the construction put upon the 27th section by the Lord Chief Justice and Bowen, L.J., in *Jones* v. *Jaggar* (2), and with the judgment of Huddleston, B., and Manisty, J., in the Court below, and think the appeal should be dismissed.

Appeal allowed.

Solicitors for judgment creditor: *Venning, Sons, & Mannings.*
Solicitors for judgment debtor: *Snell, Son, & Greenip.*

E. L.

[IN THE COURT OF APPEAL.]

Dec. 1.

THE QUEEN *v.* THE JUDGE OF THE BROMPTON COUNTY COURT AND REEVES.

County Court—Practice—Jurisdiction—Judgment Summons—Order for Committal of Debtor—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Prohibition.*

Upon a judgment summons taken out under s. 5 of the Debtors Act, 1869, there is no jurisdiction to make an order that the debt be paid by instalments, and that the debtor be committed to prison in default of payment of any of the instalments.

RULE calling upon the judge of the Brompton County Court and one Reeves, the plaintiff in an action of *Reeves* v. *Fowle*, to shew cause why a writ of prohibition should not issue to prevent them from further proceeding upon an order for the committal of the defendant made on the 4th of March, 1886.

The plaintiff having recovered judgment against the defendant in the Brompton County Court on the 7th of January, 1886, for 57*l.* 2*s.* 2*d.*, debt and costs, an order was made on the defendant to pay that amount by two instalments, the first of 20*l.* on the 21st of January, and the second of the balance on the 21st of February. The defendant made default in payment of the first instalment, and a judgment summons was issued against

(1) 5 Ex. 368. (2) 54 L. T. (N.S.) 731; W. N. 1886, p. 108.

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him under s. 5 of the Debtors Act, 1869. (1) This summons was heard on the 4th of March, and an order was made upon it for the commitment of the defendant. The order, as it appeared in the commitment summons book, was in the following terms: "Commitment ten days; suspended fourteen days." Contemporaneously with the making of this order the judge, in accordance with the usual practice of the Court, gave a verbal direction to the registrar that the warrant was not to issue at all if the defendant paid the amount by instalments of 4*l.* a month, commencing on the 18th of March. The registrar made a note of this direction on a slip of paper in the following terms:—"Fourteen days, 4*l.* a month," but did not enter it as part of the order in the commitment summons book. The defendant paid the first two instalments, but having made default in payment of the third, a warrant for his arrest and commitment was issued against him. The defendant's solicitor applied to the registrar for a copy of the order of the 4th of March, 1886, and received in reply the following statement, dated the 18th of June, 1886, bearing the seal of the Court: "Order made on the 4th of March, 1886—4*l.* to be paid on the 18th of March, 1886, and each succeeding calendar month. If not so paid, warrant of commitment might be issued. The May payment is overdue. The June payment is due to-day."

An application at Chambers by the defendant for a prohibition having been refused by Pollock, B., the present rule was obtained.

Nov. 4. *Cooper Wyld*, for the county court judge, shewed cause. It is admitted that there is no power for a county court judge to make an order for payment of a judgment debt by instalments, and for committal in the event of non-payment of the

(1) By s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), power is given to any Court to commit to prison any person "who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court." By sub-s. 2. "Such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

instalments; that would be a conditional and prospective order. The order of the 4th of March was made in respect of the past default of the defendant; it is absolute on the face of it, but in the interest of the debtor a further direction is given by the judge to the registrar, the enforcement of which is discretionary with him. It is true that Willes, J., in *Re The Debtors Act* (1), refused to make an order for payment by instalments, and committal in default; but he might have made a simple order for committal, the order to lie in the office for a definite time, which was all that was done in the present case. A very similar order was made in *Ex parte Koster*. (2)

R. Wallace, for the defendant. The direction and the order must be looked at together. The order for payment of 4*l*. a month has been substituted for the original order, and it is not a mere stay of execution, for it would operate to send the defendant to prison in respect of an instalment of his debt not yet due.

Stephen Lynch, for the plaintiff.

LORD COLERIDGE, C.J. I am of opinion that a rule absolute for a prohibition should be granted. The application is to prohibit the county court from acting on a warrant of commitment issued in pursuance of an order made by the county court on the 4th of March. That order is before us. Counsel for the applicant admits that if it was the only order his application must fail. But on the same day as that on which the order was made, the county court judge having the parties before him inquired what the plaintiff would be satisfied with and what the defendant said he could pay a month. They said 4*l*., and the county court judge in the natural pace of business in the county court, said: "Then pay 4*l*.," whereupon the registrar enters in the book of the county court the note of the judgment. Some time afterwards the defendant applied to the registrar to know what was ordered, and in answer to that application a copy of the order certified by the seal of the county court was sent by a clerk in the registrar's office, in which he informs the defendant that the order was, "4*l*. to be paid on the 18th of March, and each succeeding calendar month."

(1) 22 L. T. 666. (2) 14 Q. B. D. 597.

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That was sent by the registrar as the order of the county court which the defendant was to obey. He has not obeyed it, but instead of proceeding to incarcerate him for disobedience to *this* order, proceedings are taken to incarcerate him under another order. It follows that an order has been attempted to be enforced by a commitment which the order does not warrant, and this rule therefore should be absolute. The words of the Act are plain enough. Persons may be imprisoned for making default in payment of a debt ordered to be paid by order of the county court; the qualification is that the jurisdiction shall not be exercised if the person has not or has not had since the date of the order means to pay. The effective order here is that ordering 4*l.* a month. Since that order there has been no inquiry before the county court judge as to whether the debtor had the means of paying the instalment for which this commitment issued. So here there is an attempt to commit for disobedience to one order when the real order is in force, and proper steps have not been taken to enforce that order. The contention that all this is to be treated as waste paper, and that when a county court judge makes an arrangement of this kind of which his registrar takes a note it may be disregarded, and proceedings taken as if it had not been made, cannot be allowed to prevail. I think, having regard to the difficulty we have had in arriving at the facts of the case, the rule should be made absolute with costs.

MANISTY, J., concurred.

Rule absolute with costs.

The county court judge and the plaintiff appealed.

Dec. 1. *Sir E. Clarke, S.G.*, and *Cooper Wyld* (*De Colyar*, with them), for the county court judge.

T. H. Richmond (*Stephen Lynch*, with him), for the plaintiff.

Willis, Q.C., and *J. Scott Fox* (*R. Wallace*, with them), for the defendant.

The same arguments were urged as in the Court below.

LORD ESHER, M.R. The jurisdiction of the judges of the superior courts at chambers, which they exercise under the Debtors Act, has been exercised by them since 1869, and it might natu-

rally be supposed that they had arrived at the true interpretation of the Act which they have to administer; in fact they have arrived at it. A case came before the late Mr. Justice Willes, of all judges perhaps the most capable on the question of jurisdiction in chambers, and who sat in chambers more frequently than any other judge, and his decision has been cited here to-day. I cannot say whether this decision as to the practice under the Act was given by him in accordance with an opinion arrived at at a previous meeting of the judges, though this is very probable; but this is perfectly clear; that the judgment of Willes, J., was made known to all the judges and accepted by them as the true exposition of the meaning of the statute. What, then, has been the practice on these applications?

When a summons is taken out under the Debtors Act by a creditor, he asks the judge to make an order to commit the debtor; and I recollect perfectly well that when a summons was taken out which did not ask for an order of committal, I held that an order made on such a summons would be one which the debtor would not be bound to obey, and that the summons must ask for an order for his committal. When the summons came on to be heard before the judge, if he was satisfied that the debtor had means and that he was defying the Courts and the law, he might make an order for his immediate committal; I have known such orders made. But instead of making an order of committal, the judge might make a substituted order for payment of the debt by instalments; and this order, the power to make which seemed obviously given by s. 5 of the Act, was frequently made at chambers without the consent of the parties. Then came the question whether if the judge made an order for payment by instalments he could at the same time make an order for the committal of the debtor if any of the instalments were unpaid. That was what Willes, J., was asked to do, to make a prospective order contained in the order for payment by instalments. But that is what he decided he had no power to do, holding that he had no jurisdiction to commit in any case unless it was proved that the debtor could have obeyed the order by payment, and that when the order was for payment by instalments that doctrine would apply to each separate instalment; so that he could not

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make the prospective order asked for. If he could make such an order, it is obvious that the debtor might comply in part by paying two or three instalments, and might then be committed to prison in the teeth of the Act of Parliament for nonpayment of the next instalment, although wholly unable to pay it at the time it became due. The proper course on failure to pay any instalment was for the creditor to take out a fresh summons and satisfy the judge that the debtor was able to pay the instalment in arrear, and only then would the judge order the debtor to be committed. Even then the judge might, and often did, make a fresh order; he might think that the debtor had not sufficient means to pay by instalments of 10*l.*, but that he could pay by instalments of 5*l.*, and so make a substituted order for payment by instalments of the smaller amount, which order took the place of the original order.

That was the practice of the judges of the superior courts, and those were the limitations which they held to be imposed upon their jurisdiction by Act of Parliament. The Debtors Act says that the jurisdiction of committing a debtor to prison shall be exercised only by the county court judge or his deputy; the same limitations are imposed by statute on him that were imposed on the judges of the superior courts. It is monstrous to suppose that a county court judge has a larger power than the judges of the superior courts; he has the same jurisdiction and power that they have, and no other; and his jurisdiction is subject to the same limitations. When a summons to commit comes before him, he must first of all satisfy himself, as must a judge of the superior courts, that the debtor has the means to pay; he then has the same power to make an order: he may on that summons make an order for payment by instalments; if he does so, his power in making it is limited like that of the judge of the superior courts, and he cannot at the same time that he makes the order for payment by instalments make an order for committal in default of payment of any of the instalments. He must make an order for payment; he cannot any more than a judge of the superior court make an order for committal until the debtor has fallen into arrear and a fresh summons has been taken out. Therefore if a county court judge at the time of making an order for

payment by instalments makes an order for committal in the event of nonpayment of any instalment, he makes a prospective order, which is forbidden by statute, and exceeds his jurisdiction. Has he done so here? We are told that it is a practice among county court judges to make such orders, and we must see whether in this particular case the judge made an order for payment by instalments and at the same time an order for committal in default of payment of any one of them. If he did, he exceeded his jurisdiction. It is argued that he did not; that the order is contained in the book of the Court, and that that was the only order he made; and that if he gave a direction to the registrar, that direction was no order; and it is positively suggested that the direction was one which the registrar need not, and in certain circumstances ought not, to obey. At the same time that the county court judge made this order which was entered in the book of the court, there was a separate order given by him to the registrar. The registrar is the mere servant of the judge, and his only warrant is to execute the order of the judge; and he, on receiving the order, made a note at once on a separate slip of paper, "Fourteen days, 4*l.* a month." What did he understand by that? Obviously, as he says, he understood it to be an order that the debtor was to pay 4*l.* on the 4th of March and 4*l.* each calendar month afterwards; otherwise that he should be committed to prison for fourteen days. Can any one doubt that the county court judge intended this to be an order to the registrar? At any rate the registrar understood it to be an order, and such a direction has always been acted upon by the registrar as an order. It is given by the county court judge as an order, it is accepted and acted upon by the registrar as an order, and it is an order. I am of opinion that, wherever that practice, which no doubt has been suggested by the highest motives of convenience to all parties and of mercy to the debtor, has been adopted by county court judges, they have done that which has been held by judges of the Superior Courts to be in excess of their own power and jurisdiction. I agree with the Divisional Court that there has been an excess of jurisdiction, and that the practice complained of is illegal, and that if it is desirable that such a power should be exercised, it can only be done in pursuance of a future Act of Parliament.

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THE QUEEN v. JUDGE OF BROMPTON COUNTY COURT.

LINDLEY, L.J. The rule laid down by Willes, J., in *Re Debtors Act*, 1869 (1), has always been considered to be a sound rule, and it has long been settled law that a judge cannot at the same time make an order for payment by instalments and for committal in default. The reason for this is obvious. The legislature required an investigation of the debtor's means of payment before making an order for his imprisonment. In the present case a doubt was raised in my mind whether the direction to the registrar was anything more than a stay of execution; but this doubt has been removed by the registrar's letter of the 18th of June, which shews that he regarded it as an order to be acted upon by him. There seems to be a practice in the county courts of so drawing up orders and giving directions that it is difficult to find out what the order means. But looking at the facts in this case, the order was precisely one which the Court had no power to make. If we look at the formal order in the book of the Court, we do not see at all what the order was, and in order to get at the real order we have to find out what was the direction given by the judge to the registrar. I agree with the view of the Divisional Court.

LOPES, L.J. The jurisdiction given by the Debtors Act, 1869, is in favour of the liberty of the subject and in restraint of imprisonment. It is exercisable by the judges of the High Court in chambers, and very largely exercisable by the judges of the county courts. The practice at judges' chambers is well known. Commitment orders cannot be granted conditionally; an order for commitment unless the debtor pays the instalments is a bad order. There is no doubt that there is a practice to grant orders of committal and to defer the time of drawing them up; such orders have long been made; and I should think they are good orders, authorized by the inherent power which every Court has over its own practice. The county court practice ought to be the same as that in the High Court; the jurisdiction of the county court judges is given by the same Act as that which gives it to the judges of the Superior Court. What is the order in this case? The facts are remarkable; the minute of the order speaks of a committal for ten days, to be suspended for fourteen days; that would be a perfectly good order, if it stood alone. But simulta-

(1) 22 L. T. 666.

neously a direction is given by the judge to the registrar that the warrant of commitment is not to issue if the debtor pays the debt by regular instalments of 4*l.* a month. Are we to look at the order by itself, or are we to look at it as explained by the direction? I am unable to see how we can call the direction anything but an order; emanating as it does from the judge, it is as much an order as that which appears in the order book, and from the subsequent letter of the registrar it is clear that they must be looked at together. Do they, then, mean anything but that the debtor is to pay by instalments of 4*l.* a month, and be committed on default in paying the instalments? If that is the meaning, the order is most distinctly conditional and bad. The legislature is most careful to say in the 5th section of the Debtors Act when the power of committal is to be exercised, and it is only in those specified circumstances that an order can be made. Looking at the present case, we see the mischief which might arise were such a practice to prevail; an order might be made upon a debtor for payment by four monthly instalments, and after having paid the first two he might be unable to pay the third instalment through want of means; still the order of committal stands against him, and he must go to prison. But if he had the opportunity (as he ought to have) of again going before the judge to shew his inability to pay that instalment, no committal order would be made against him. This, it is obvious, would be a most serious mischief. I think that this practice is a plain evasion of the Act of Parliament, and deprives the debtor of that protection which has been so carefully provided for him. The decision of the Court below must be affirmed.

Appeal dismissed.

Solicitor for county court judge: *R. Wright.*
Solicitor for plaintiff: *T. J. Robinson.*
Solicitor for defendant: *J. G. Dearle.*

W. J. B.

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Aug. 9, 10;
Nov. 11;
Dec. 21.

[IN THE COURT OF APPEAL.]

EX PARTE OFFICIAL RECEIVER. IN RE MORRITT.

Bill of Sale—Validity—Power of Sale—Proviso excluding s. 20 *of the Conveyancing Act,* 1881—*Power to break open Doors and Windows and seize Goods —Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *ss.* 2, 19, 20—*Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Form in Schedule.*

A bill of sale of personal chattels, given as security for money lent, contained a provision "that the power of sale conferred on the mortgagees by the Conveyancing Act, 1881, shall be exercisable by them in every respect as if the 20th section of the said Act had not been enacted."

An express power was given to seize the chattels for any of the causes specified in s. 7 of the Bills of Sale Act, 1882, but for no other cause, and for that purpose to break open the doors and windows of the premises where the chattels might be :—

Held, by Lord Esher, M.R., and Cotton, Lindley, Bowen, and Lopes, L.JJ. (Fry, L.J., dissenting), that the bill of sale was not made void by s. 9 of the Bills of Sale Act, 1882.

Decision of Manisty and Cave, JJ., affirmed.

Per Cotton, Lindley, and Bowen, L.JJ. :—A mortgagee of personal chattels, of which he has taken possession, has, without any express power in the mortgage deed, upon default in payment of the mortgage money by the mortgagor, and after reasonable notice to him, power to sell the chattels.

Consequently, if a bill of sale to which the Bills of Sale Act, 1882, is applicable, contains an express power for the grantee to seize the goods (such a power being authorized by that Act as a provision "for the maintenance of the security"), the grantee, when he has seized the goods, has power to sell them after the expiration of the five days fixed by ss. 7 and 13 of that Act. In such a case, therefore, the power of sale conferred by s. 19 of the Conveyancing Act, 1881, is not required, and is not incorporated, and a proviso in the deed excluding the operation of s. 20 of that Act is merely superfluous, and does not invalidate the deed under s. 9 of the Act of 1882.

If a bill of sale subject to the Act of 1882 contains provisions relating to the seizure of the goods, which are not contrary to any express provision of that Act, though they may be in part void under the general law, it is not thereby rendered invalid.

Per Lord Esher, M.R., and Lopes, L.J. :—The enactment by the Act of 1882 of a statutory form of bill of sale negatives, and is inconsistent with, the incorporation in a bill of sale subject to that Act of the power of sale conferred by the Conveyancing Act, 1881, and the Act of 1882 gives by implication to the grantee under such a bill of sale power to sell the goods at the expiration of five days after they have been seized.

And, even if a power of sale is not given by implication, a power to seize the goods may be lawfully inserted in the deed, and the grantee, having seized the

goods, can sell them as assignee of them, and, if the grantor does not redeem them within five days, his right of redemption will be barred.

Semble, per Fry, L.J. :—That a mortgagee (as distinguished from a pledgee) of chattels has, in the absence of statute, no implied power to sell them on default by the mortgagor, even if he has taken possession of them.

But, at any rate, the Bills of Sale Act, 1882, implies that the power of sale conferred by s. 19 of the Conveyancing Act is, with the fetters on its exercise imposed by s. 20 of that Act, imported into the scheduled form of bill of sale, and an attempt to exclude the operation of s. 20 will render a bill of sale void under s. 9 of the Act of 1882.

APPEAL by the official receiver, as trustee of the property of Charles Morritt, a bankrupt, from a decision of a Divisional Court, sitting in bankruptcy, reversing an order of the County Court at Leeds by which a bill of sale, executed by the bankrupt on the 23rd of January, 1886, was declared void.

The bill of sale was given by the bankrupt as security for money advanced to him by Henry Bentley & Co. Limited, a company incorporated under the Companies Act, 1862, and by it the mortgagor assigned unto the mortgagees the fixtures, chattels, and things specifically described in the schedule thereto annexed, by way of security for the payment of 1658*l.* 8*s.* 11*d.*, and interest at 5 per cent.: Provided always, that it should be lawful for the mortgagees at any time or times thereafter, for any of the causes specified in the 7th section of the Bills of Sale Act (1878) Amendment Act, 1882, but for no other causes whatever, without giving any previous notice to the mortgagor of their intention in that behalf, to take possession of all or any of the fixtures, chattels, and things for the time then being subject to the security, and for that purpose, or for any other purpose connected therewith, to have at all reasonable times full liberty of ingress, egress and regress into and from any of the premises wherein the same might be, and every part thereof, and if necessary to break open any outer or inner doors and the windows thereof in order to obtain admittance for that purpose, and to retain possession of all or any of the said fixtures, chattels or things, either there or in any other place to which they might think fit to remove them, so long as they might think fit, or at any time to give up and retake and resume such possession, without being responsible for any loss or damage which might arise thereby to the mortgagor,

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but that, until possession should be so taken or retaken, the said fixtures, chattels, and things should remain in the possession of the mortgagor or his assigns. And it was thereby agreed and declared "that the power of sale conferred upon the mortgagees by the Conveyancing and Law of Property Act, 1881, shall be exercisable by them in every respect as if the 20th section of the said Act had not been enacted, and that the mortgagees shall stand possessed of the proceeds of any sale made by them upon trust to retain thereout the said principal sum, or so much thereof as may for the time being remain unpaid, and the interest then due, together with all costs, charges, payments, and expenses incurred, made, or sustained by the mortgagees in or about entering upon the said premises, and in discharging any distress, execution, or other incumbrance on the said fixtures, chattels, or things, or any of them, and seizing, taking, retaining, and keeping possession thereof, and in or about the carriage, removal, warehousing, or sale (including the cost of inventories, catalogues, or advertising) thereof, or any part thereof, and to pay over the surplus (if any) of such proceeds to the mortgagor." There was also a proviso "that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagees for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

On the 30th of January, 1886, a receiving order was made against Morritt, and he was afterwards adjudicated a bankrupt. On the 18th of February, 1886, on the application of the official receiver as trustee in the bankruptcy, the judge of the county court made an order declaring the bill of sale void, and restraining the company from interfering with the personal estate and effects comprised therein, and ordering the company forthwith to withdraw from possession.

The company appealed to the Divisional Court.

On the 10th of May, 1886, the Divisional Court (Manisty and Cave, JJ.), reversed the decision of the county court, holding that the bill of sale was valid.

Leave was given to appeal to the Court of Appeal.

Aug. 9, 10. *Muir Mackenzie*, for the official receiver. *George Banks*, for the mortgagees.

As the case was afterwards re-argued before the full Court of Appeal, it is unnecessary to report the arguments adduced on this occasion.

THE COURT (Lord Esher, M.R., and Bowen and Fry, L.JJ.) reserved their judgment.

Nov. 5. LORD ESHER, M.R., stated that the case was to be re-argued before the full Court.

Nov. 11. The case was re-argued accordingly.

Muir Mackenzie, for the official receiver. It is submitted that the bill of sale is void, as not being in accordance with the form in the schedule to the Bills of Sale Act of 1882; first in respect of the clause with regard to the power of sale; and secondly, in respect of the clause which gives power to break open doors and windows and enter and remove the goods, and to charge the expenses of so doing by way of addition to the principal moneys secured.

With regard to the clause as to the power of sale, it is contended that, whether the power of sale given by s. 19 of the Conveyancing Act, 1881 (1), to mortgagees is or is not incorporated

(1) The Conveyancing Act, 1881, contains the following provisions:

Sect. 2 "(I.) Property, unless a contrary intention appears, includes real and personal property."

"(VI.) Mortgage includes any charge on any property for securing money or money's worth."

Sect. 19 "(1). A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, namely:

"(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof.

"(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained."

Sect. 20: "A mortgagee shall not

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by the form in the schedule to the Bills of Sale Act, 1882, in either case this clause is a deviation from the form. First, it is

exercise the power of sale conferred by this Act unless and until—

"(i.) Notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

"(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

"(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

The Bills of Sale Act of 1882 provides by

Sect. 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

"(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

"(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

"(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

"(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

"(5.) If execution shall have been levied against the goods of the grantor under any judgment at law:

"Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just."

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

Sect. 13: "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

The form of bill of sale given in the schedule to the Act does not contain any power to sell or any power to seize the chattels comprised in it, but it authorizes the insertion of "terms as to insurance, payment of rent, or otherwise, which the parties

contended that such power is not incorporated by the form. The 20th section of the Act of 1881 makes the exercise of the power of sale under it subject to certain restrictions, e.g., it cannot be exercised till default in payment of the mortgage money for three months after notice, whereas the Act of 1882 contains in s. 13 express provisions with regard to bills of sale, imposing a different restriction, viz., that the goods cannot be sold till five days after seizure. The effect of this express provision in the later Act, which has special relation to bills of sale, is to shew that it was not contemplated that the former general Act should apply to bills of sale within the later Act, and that the form was not intended to incorporate the power given by the Conveyancing Act. There was no necessity that such a power should be incorporated. In the case of a mortgage of moveable chattels there is an inherent power of sale on default arising out of the ownership of the chattels. In the case of mortgages of land an express power of sale is necessary, because otherwise the equity of redemption could only be barred by a foreclosure suit. The equity to redeem is barred in the case of chattels by a sale, without the necessity of foreclosure: Story's Equity Jurisprudence, ss. 1030, 1031, 1032; 2 Fonblanque's Equity, 5th Ed. p. 261; *Jones* v. *Smith* (1); *Tucker* v. *Wilson* (2); *Lockwood* v. *Ewer* (3).

[FRY, L.J. Those cases are cases of "stocks," not of moveable chattels, and the ground taken seems to have been that, the value of stocks being subject to fluctuations, the necessity for obtaining a decree of foreclosure before selling would as a matter of business destroy the security. Are there any decisions on the point with regard to other sorts of personalty?]

The reasoning of the cases applies also to moveable chattels. It would be impossible to raise money on moveable chattels if a decree of foreclosure were necessary before they could be sold. There have been decisions in the United States which seem to apply the same doctrine to moveable chattels: *Cortelyou* v.

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may agree to for the maintenance or defeasance of the security," and it contains a proviso that the chattels thereby assigned shall not be liable to be seized or taken possession of by the grantee for any cause other than those specified in s. 7 of the Act.

(1) 2 Ves. Jun. 372, 378.
(2) 1 P. Wms. 261; 5 B. P. C. 193.
(3) 2 Atk. 303; 9 Mod. 275.

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Lansing (1); *Patchin* v. *Pierce* (2); *Brown* v. *Bement* (3); *Hart* v. *Ten Eyck.* (4) The statutory form relies, it is contended, on the power of sale incident to a mortgage of chattels apart from the Conveyancing Act, subject only to the restrictions imposed by s. 13 of the Bills of Sale Act of 1882, and the attempt to incorporate in part the power given by the Act of 1881 is a deviation from the form. If the power given by the Conveyancing Act is not incorporated by the form, then the insertion of a clause purporting to give the power given by s. 19 of the Act, free from the restrictions of s. 20, that is to say, purporting to give an immediate power of sale, makes the bill of sale bad. It was not the intention of the Conveyancing Act to restrict or destroy a power which would arise from the fact of the ownership of the mortgagee; it was to provide for the implication of powers, where it had previously been necessary to give them expressly.

[FRY, L.J. Was it not the usual practice to insert express powers of sale in mortgages of chattels before the Act, and is not the intention that powers which were before usually inserted should now be implied? It may be that the power given by the Act of 1881 is larger than that which would have existed before. For instance, could the mortgagee of a chattel, without an express power to do so, have bought in the goods at an auction sale?]

He might have done anything which was reasonable in the way of realizing his security. The introduction of this clause in the bill of sale is either an attempt to alter the rights of the parties as they would be according to the form in the schedule, or at any rate it is an embarrassing and misleading addition to the statutory form, which was intended to be simple. Any person reading this bill of sale would regard it as giving an immediate power of sale. If so, the bill of sale would be void according to the doctrine laid down in *Ex parte Stanford* (5); *Hetherington* v. *Groome.* (6)

Secondly, if the power given by the Conveyancing Act is to be considered as incorporated by the scheduled form, then it is

(1) 2 Caine's Cases in Error, 210.
(2) 12 Wendell, 61.
(3) 8 Johns. 96.
(4) 2 Johns. Chancery Reports, 100, 101.
(5) 17 Q. B. D. 259.
(6) 13 Q. B. D. 789.

equally clear that the bill of sale deviates from that form, because it excludes the restrictions imposed by the 20th section of the Conveyancing Act. Sect. 20 of that Act is not inconsistent with s. 13 of the Act of 1882, and it is difficult to avoid the conclusion that, either the power given by s. 19 is not incorporated, or that it is incorporated subject to the restrictions imposed by s. 20. Thirdly, the provision which gives power to the mortgagees at any time to break open doors and windows and enter and remove the goods, and charge the expenses of so doing on the goods, in addition to the sum secured, is not necessary for the maintenance of the security, and therefore is a deviation from the form.

G. Banks, for the mortgagees. The framer of the Bills of Sale Act of 1882 and the form must have contemplated that the grantee would have a power of sale. If so, whence was that power to arise? It is suggested that such a power exists by virtue of the ownership of the mortgagee, but against that suggestion may be set the fact that it was the universal practice to insert powers of sale in mortgages of personal chattels, and the plain words of the Conveyancing Act, which gives a power of sale in all the cases to which it applies, and which clearly include the case of a mortgage of personal chattels by bill of sale. It is therefore submitted that, if a bill of sale be silent as to a power of sale, the provisions of the Conveyancing Act with regard to the power of sale would apply: and, therefore, there would be in such a case the power of sale given by s. 19 of that Act, subject, no doubt, to the restrictions imposed by s. 13 of the Bills of Sale Act of 1882, and possibly, also, to those of s. 20 of the Act of 1881, for there is nothing inconsistent in the two sections. But, by the 2nd sub-section of s. 19, the mortgage deed may vary or extend the powers given by the Act; so here the bill of sale excludes the operation of the 20th section, leaving the power given by s. 19 subject only to the restriction imposed by s. 13 of the Act of 1882.

[FRY, L.J. May it not be said that the form, being silent as to the power of sale, must be taken to incorporate the power as it is given by the Act of 1881 without variation, and that the extension of the power by excluding the operation of s. 20 is therefore a deviation from the form?]

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The power of sale being a provision for the maintenance of the security, the parties might insert such a modification of the statutory power as they should agree upon, without deviating from the form. If, on the other hand, s. 20 of the Act of 1881 is to be considered as inconsistent with s. 13 of the Act of 1882, and, therefore, as not applicable to bills of sale, then all this clause does is to point this out. The fact that the restriction imposed on the power of sale by s. 13 of the Act of 1882 is not expressly pointed out by the bill of sale, cannot vitiate it. It cannot be necessary to set out expressly everything which is contained in the Bills of Sale Acts for the benefit of the grantor. The legal effect of the clause is, that the power of sale is exercisable subject to s. 13. A decision in favour of this bill of sale would not in any way contravene the decision in *Ex parte Stanford.* (1) All which that case decided was, that there must not be added to the form words which alter its legal effect.

The clause giving power to enter and seize the goods and to charge the expenses of so doing upon them, does not invalidate the bill of sale. So far as the power to break open doors and windows and enter is concerned, the form permits the insertion of any terms which the parties may agree upon for the maintenance of the security. It is true that the power to take possession of the chattels assigned can only be exercised in the cases specified by s. 7 of the Act of 1882, and, therefore, in order that a power to seize may be validly given for default in performance of a covenant, such covenant must be *necessary* for maintaining the security: *Bianchi* v. *Offord* (2); *Furber* v. *Cobb.* (3) But the form permits the insertion of any terms which the parties may agree upon as convenient with regard to maintaining the security, so long as there is no attempt to extend the power of seizure beyond what is allowed by s. 7. Here the power to enter is only given "if necessary," which must mean when the occasion of seizure arises. If there were no power to enter the premises on which the goods are, the security would be absolutely worthless. So this clause may be considered necessary for maintaining the security. Such a clause as this was held good in *Lumley* v. *Simmons.* (4)

(1) 17 Q. B. D. 259.
(2) 17 Q. B. D. 484.
(3) 17 Q. B. D. 459.
(4) 55 L. J. (Ch.) 759.

Then, again, the power to charge the expenses on the goods assigned is not objectionable. The mortgagee is entitled to realise the sum secured nett, otherwise the security would not be one for the sum advanced, but only for that sum, minus the expenses of maintaining and realising the security. It is contended that, even without this provision, the mortgagees could charge those expenses on the goods.

Muir Mackenzie, in reply.

Cur. adv. vult.

Dec. 21. COTTON, L.J., read the following judgment, in which Lindley and Bowen, L.JJ., concurred. The question which we have to decide is, whether the bill of sale in the present case is void under s. 9 of the Bills of Sale Act, 1882, as not being in accordance with the form given in the schedule. [The Lord Justice stated the provisions of the bill of sale, and continued:—] We are asked, on behalf of the appellant, to hold, that the insertion of the clause excluding the operation of s. 20 of the Conveyancing Act of 1881, is an attempt to alter the legal rights of the parties from what they would be if the statutory form had been observed. It was contended that this was the effect of the clause, on the ground that it introduced into the bill of sale the power of sale to be found in s. 19 of the Conveyancing Act, 1881, and that this power of sale would not, except by contract of the parties, have applied to mortgagees under a bill of sale to which the Act of 1882 applies. But I think that this is not the effect of the clause. The clause assumes that the power of sale given by the Act of 1881 applies to bills of sale, and, on that assumption, attempts to regulate its exercise, but it does not by contract introduce the power of sale given by the Act of 1881. Then it was contended that, if the power of sale in s. 19 of the Conveyancing Act, 1881, is given to the mortgagee under a bill of sale to which the Act of 1882 applies, the provision which removes the restrictions contained in s. 20 of the Conveyancing Act, 1881, would impose upon the mortgagor a liability different from that which would result from a bill of sale in the form given in the schedule; and that this would, in accordance with the decision of this Court in *Ex parte Stanford* (1), make the bill of sale

(1) 17 Q. B. D. 259.

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void. In dealing with this objection the first question is this—Is the power of sale, contained in s. 19 of the Act of 1881, given to mortgagees claiming under a bill of sale regulated by the Act of 1882 as if inserted in the bill of sale? Having regard to the definitions of "mortgage" and of "property" in the Act of 1881, and to the fact that, before the Act of 1881, powers of sale were usually inserted in bills of sale, unless there is something in the Act of 1882 or in the bill of sale which is sufficient to lead to a different conclusion, the power of sale given by s. 19 of the Act of 1881 would, by force of that Act, be given to mortgagees under a bill of sale. But the Act of 1881 did not make it compulsory on mortgagors and mortgagees to adopt the power of sale given by s. 19. One of its principal objects was to render it unnecessary to introduce certain clauses usually inserted into deeds, but it left it optional to parties having power to contract to vary or to exclude altogether the provisions as to sale contained in s. 19. If this is so, I think that this power would not be given to a mortgagee when the nature of the security or the provisions of the instrument shew that the power of sale given by the Act is unnecessary.

In order to solve the question which I am now considering, it is necessary to consider the exact rights of sale which a mortgagee of personal chattels possesses. A pledge of personal chattels as a rule is and must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring. A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale. A mortgage of personal chattels involves in its essence, not the delivery of possession, but a conveyance of title as a security for the debt. A mortgage of personal chattels may, however, be accompanied with a transfer of possession; and mortgages of personal chattels in cases where possession is retained by the mortgagor may, and commonly do, provide that on default the mortgagee may take that possession which is

until default withheld from him. There is very little, if any, authority on the point. But I am of opinion that a mortgagee of personal chattels which are in his possession is not in a worse position than a pledgee, and that, where there is no express power of sale given by the mortgage, he has, after default in payment, and after he has given the mortgagor a reasonable time to pay the money due, a power to sell and give a good title to the purchaser, though, of course, the mortgagor has, at any time before sale, a right on payment of the money due, including expenses, to prevent the sale and redeem the chattels. The form given by the Act of 1882 allows provisions to be added for the maintenance of the security. This, in my opinion, enables provisions to be added giving or regulating a power to enter and seize the chattels comprised in the bill of sale. There are in the bill of sale under consideration in the present case provisions enabling the mortgagees to seize. Objections have been taken to these provisions, which I will hereafter deal with, but for the present I assume them to be good. When possession of the chattels has been taken by the mortgagees, they have, in my opinion, as already stated, a power of sale, after a reasonable time has been allowed to the debtor for payment. This is, I think, fixed by ss. 7 and 13 at five days after possession taken. There is, therefore, under the bill of sale (independently of and without introducing the power given by the Act of 1881) a power to sell which will arise on possession being taken—that is, before the time previous to which the Act of 1882 prohibits any sale being made. In my opinion, therefore, it would be unreasonable to give to the mortgagee a power of sale "as if it had been in terms conferred by the mortgage deed," to quote the words of s. 19 of the Act of 1881, when this power could not under the provisions of the Act of 1882 be exercised before the mortgagee would, without the provisions of the Act of 1881, have a power of sale. It is suggested that by s. 7 of the Act of 1882 a power to seize the chattels mortgaged is recognised and impliedly given, and that this renders it unnecessary to rely on the express power to seize given by the bill of sale now in question. But I think it unnecessary to decide this point. In my opinion the clause

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relating to the power of sale erroneously assumed to be given by the Act of 1881 does not make void the security.

But it is urged that the provisions as to seizure of the chattels do so. In my opinion this objection fails. I will assume that there are in these provisions many stipulations which could not be enforced, but the whole provision is one "for the maintenance of the security," and, though some part of the provision may not be capable of being enforced, the mere introduction of the provision does not, in my opinion, render the deed void under s. 9. In my opinion the mere fact that provisions are inserted which are not contrary to any express provisions of the Act of 1882, though in consequence of the general law applicable to contracts they are invalid, does not make the bill of sale void. These provisions may be invalid and superfluous, but, as they are introduced for the maintenance of the security, in my opinion they do not make the deed void. In my opinion the appeal fails, and must be dismissed.

FRY, L.J., read the following judgment. I much regret that I am unable to concur in the judgments of my learned Brethren. As already stated by Lord Justice Cotton, the bill of sale in question contains an agreement that the power of sale conferred upon the mortgagees by the Conveyancing Act, 1881, shall be exercisable by them in every respect as if the 20th section of that Act had not been enacted. It is contended that this provision prevents the bill of sale from being in accordance with the statutory form in the Act of 1882, or, in other words, that the bill of sale will have a different legal effect from that which would result from the statutory form. We must therefore inquire what is the legal result of these two instruments as regards the power of sale.

A bill of sale by way of security, when not in reality a pledge, is a mortgage of chattels, and a mortgage of chattels is essentially different from a pawn or pledge. A mortgage conveys the whole legal interest in the chattels; a pawn conveys only a special property, leaving the general property in the pawnor: a pawn is subject in law to a right of redemption, and no higher or different right of redemption exists in equity than at law; a mortgage is

subject, not only to the legal condition for redemption, but to the superadded equity. A pawn involves transfer of the possession from the pawnor to the pawnee. A mortgage may be made without any transfer of possession. In my opinion, the two transactions of pawn and mortgage are in their nature distinct, and I think that, except by new agreement between the parties, what was originally a pawn never becomes a mortgage, and what was originally a mortgage never becomes a pawn.

A pawnee has a power of sale on default in payment at a time fixed. A mortgagee, having the whole legal title to chattels, can of course sell them at law, but the equitable right of the mortgagor to redeem can, in my opinion, only be excluded by the presence of an express or implied power of sale. This right to sell is properly described as a power, because, where it exists, it enables the mortgagee to confer on a purchaser a larger estate in equity than he himself possesses, and it excludes the mortgagor from all equitable right against the property sold.

Is there an implied power of sale in a mortgage of chattels? A careful examination of all the authorities cited has not disclosed to me a single clear authority for an affirmative answer to this question, and yet, if such a power of sale existed, abundant traces of it would, I think, be found in the books. Not only, however, are there no such traces, but the conduct of the legislature is opposed to its existence. When in 1854 the legislature dealt (by the Merchant Shipping Act, 1854) with mortgages of ships, they seem to have known nothing of any implied power of sale, but by express enactment (s. 71 of the Merchant Shipping Act) they conferred such a power on the mortgagee. I shall hereafter refer to similar conduct of the legislature in 1881. From all these circumstances I incline to the opinion that there is not in the case of a mortgage of chattels any power of sale implied by law.

Furthermore, the notion that a power of sale, which did not exist at the creation of the mortgage, and whilst the mortgagee was out of possession, would arise and come into existence on possession being taken by him, is one for which I know of no authority, and no analogy. But for the opinion of my learned Brethren, I should not have thought it to be *law*.

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But, whether there be or be not an implied power of sale in mortgages of chattels, is, I conceive, now of comparatively little importance, for in 1881 was passed the Conveyancing Act, which, as its title shews, was intended to simplify and improve the practice of conveyancing, and to vest in mortgagees powers commonly conferred on them by provisions inserted in mortgages. Now three things are to me plain in relation to this Act. First, that, by the definition clause in it, the word "mortgage" includes, and was intended to include, a bill of sale of personal property; secondly, that the legislature did not contemplate that bills of sale carried with them any implied power of sale, whether before or on possession, which made it undesirable to apply to them the express powers given by the statute; and thirdly, that, in the year 1881, one of the powers which, by the practice of conveyancers, were commonly conferred by express provision on mortgagees of chattels, was a power of sale. Of this practice I should entertain no doubt independently of precedent. But a consideration of the works on conveyancing confirms me in that conclusion. The earliest form of a bill of sale which I have found is in West's Symboleography, s. 428 (1605). This form contains no power of sale, but, when carefully looked at, it will be found to be a mere memorandum of pawn, which took effect by the transfer of possession. But, from the Practical Conveyancer of Lilly, p. 495, published in 1719, to Kay and Elphinstone's Compendium, vol. 2, pp. 708 and 810, published in 1878, I find a long catena of precedents in the most esteemed works on conveyancing in which express powers of sale are found.

The 19th section of the Act of 1881 provides that, where the mortgage is by deed, the mortgagee shall have certain powers, including a power of sale. But sub-s. 2 enacts that the provisions of the Act relating to the powers so given, comprised either in s. 19, or in any subsequent section regulating the exercise of those powers, may be varied or extended (not, be it remarked, *excluded*) by the mortgage deed; and, by sub-s. 3, it is enacted, that the section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed.

Sect. 20 follows, and puts a fetter on the exercise of the power

of sale given by the previous section, for it enacts that a mortgagee shall not exercise the power of sale conferred by the Act, unless and until one or other of three events there mentioned shall have happened.

If, in the interval between the Conveyancing Act of 1881 and the Bills of Sale Act of 1882, an instrument had been executed in the form subsequently given by the Act of 1882, and had maintained an absolute silence as to any power of sale, I can entertain no doubt but that, by force of the Act of 1881, the mortgagee would have been clothed with the power of sale given by the 19th section of that Act, but would have been subject to the fetters imposed by the 20th section.

Again, I am of opinion that, if there was by common law and the ordinary rules of equity any power of sale implied in a bill of sale before the Act of 1881, the insertion of an express and elaborately defined power by the statute in any bill of sale subsequently executed, would exclude from such instruments by implication the continuance of the implied power. Such would be the result, in my opinion, of an express power contained in a bill of sale and inserted by the contract of the parties, and I am of opinion that the like effect must be given to the special power which the Act of 1881, so to speak, inserts. The fetters imposed by the Act of 1881 would be nugatory, if the mortgagee could fall back on an implied power which they did not bind.

Again, if, after the passing of the Act of 1882, an instrument were executed in the statutory form, and it maintained an absolute silence as to any power of sale, it appears to me clear that such an instrument would confer on the mortgagee the power of sale given by the 19th section of the Act of 1881, subject to the fetters imposed by the 20th section, unless there be found, either in the other terms of the instrument, or in the provisions of the statute of 1882, something to exclude or limit the operation of the Act of 1881. An instrument come to by mere convention and consent before the Act of 1882 in the form afterwards scheduled to that Act, and an instrument come to after the passing of that statute in consequence of its constraining influence, must, in my opinion, be primâ facie construed in precisely the same manner. The legislature in passing the Act of 1882

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must (as a matter, not merely of legal inference, but of plain fact) have had the statute of 1881 in their contemplation, and, if they had been minded to exclude the operation of the Act of 1881, they would in all probability have done so by express terms. When the 13th section of the Act of 1882 implies the existence under the statutory form of a power of sale, it is difficult to resist the conclusion that the power of sale referred to was that given in express terms by the statute of the previous year.

Again, it appears to me that there is nothing in the statutory form which by implication or reasonable inference excludes the power of sale which the statute of 1881 had given.

Is there anything in the Act of 1882 itself which by implication excludes the power of sale under the statute of 1881? It was pressed upon us that the general scope and object of bills of sale is inconsistent with the fetters placed on the power of sale by the Act of 1881, and that it would be absurd to apply such provisions to such instruments. But what the legislature thought reasonable in 1881 I cannot declare absurd in 1882.

The provisions of the Act of 1882 must, however, be looked at carefully. The 7th section of this Act prevents the seizing or taking possession of the chattels except for certain causes, and enables a Court, if satisfied that the cause of seizure no longer exists, to restrain the removal or sale of the chattels, and the 13th section prevents the removal or sale of chattels till five days after they have been seized or taken possession of. Both these clauses appear to me to be negative and prohibitory in their character, not to give powers to the mortgagee, but to fetter the exercise of powers where they exist. Nor are these clauses, in my judgment, inconsistent with the power of sale given by the Act of 1881. These new fetters on the exercise of the power of sale are not, I think, inconsistent with the other fetters imposed by the 20th section of the Act of 1881; there is no logical or real inconsistency in saying that the power of sale shall not be exercised till three months after notice requiring payment, and till five days after seizure. On the contrary, the object of the Act of 1882, as I gather from its provisions, was to impose stringent limitations on the power of contracting for the

loan of money on chattels as against the lender, and to disqualify the borrower from bestowing on the lender many powers which he had been in the habit of demanding. This object is furthered, and not frustrated, by the importation into the statutory form of the fetters on the power of sale contained in the 20th section of the Act of 1881.

But the Act of 1881 had, as we have already seen, given to the contracting parties a capacity by the mortgage deed to vary both the power of sale and the fetters imposed on its exercise. Does this power survive to the contracting parties after the statute of 1882, because, if it does so survive, the contracting parties in the present case have in unequivocal terms expressed their intention to exercise such authority? The answer depends on the 9th section of the Act of 1882, which demands accordance with the scheduled form. In my opinion this scheduled form imported both the power of sale given by the 19th section of the Act of 1881 and the fetters imposed by the 20th section, so that the power can only be exercised on the happening of one or other of the three enumerated contingencies. But, if the fetters be by express stipulation struck off, then the power of sale is liberated and set free, and it may be exercised, though no one of the contingencies has happened, and then the instrument as drawn has a legal effect which goes beyond that which would result from the statutory form, and so is void as not being in accordance therewith.

One other argument requires to be considered. The statutory form gives to the contracting parties liberty to insert terms which they may agree upon for the maintenance or defeasance of the security, and it has been argued that the creation of a power of sale is such a term. In this argument I am not able to concur, notwithstanding the countenance which it derives from *Consolidated Credit Corporation* v. *Gosney*. (1) I think that a power of sale is a collateral power, neither, strictly speaking, in maintenance or in defeasance of the security. If a power of sale was within these words, I do not see what other provision would not be, and so to interpret the words would be to repeal s. 9 of the Act of 1882.

(1) 16 Q. B. D. 24.

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For these reasons I am of opinion that the bill of sale in question is not in accordance with the statutory form, and is void.

I have explained my views at a length which may well be thought inordinate. But I have been desirous to shew that I do not differ from the rest of the Court without having fully considered the subject, and I only regret that, in the result, I have lost my way in the maze of legislative enactments, beyond recall even by the guiding voice of my Brethren.

Lopes, L.J., read the following judgment, in which Lord Esher, M.R., concurred. The bill of sale in question contains an agreement and declaration that the power of sale conferred upon the mortgagees by the Conveyancing Act, 1881, shall be exercisable by them in every respect as if the 20th section of the said Act had not been enacted. The bill of sale, therefore, imports into the statutory form the power of sale given by the 19th section of the Conveyancing Act, 1881, unfettered by the 20th section of the same Act. It was contended that the introduction of this provision violated the Bills of Sale Act, 1882, because a bill of sale with such a provision in it cannot be in accordance with the statutory form, and would have a different legal effect. It was also contended that in a bill of sale in the statutory form a power of sale is conferred on the mortgagee by virtue of the Conveyancing Act, 1881, and that otherwise there is no power of sale exercisable by a mortgagee whose mortgage is in the statutory form under the Bills of Sale Act, 1882. Before the passing of the Bills of Sale Act, 1882, we have no doubt but that the grantee in a bill of sale by deed silent as to any power of sale would have been clothed with the power of sale conferred by the Conveyancing Act, 1881. The powers conferred by s. 19 of the Conveyancing Act on a mortgagee, when the mortgage is made by deed, apply only if and as far as a contrary intention is not expressed in the mortgage deed. The question, therefore, arises whether there is anything in the Bills of Sale Act, 1882, or in the statutory form in the schedule, which, expressly or by implication, excludes the application of the powers conferred by the Conveyancing Act, 1881, to the new statutory bill of sale. The

provisions of the Bills of Sale Act and the statutory form, in accordance with which bills of sale by way of security for payment of money must be made, clearly indicate to our minds that the legislature did not intend to call in aid powers conferred by any other Act of Parliament, but intended the new bill of sale to be independent of them and complete in itself. Most of the powers in the Conveyancing Act apply to a different state of things. If any of those powers attach, all, except those inconsistent with the statutory form and the Act, attach. Except with variations, nearly all of them are inconsistent or inapplicable. We cannot think that Parliament, when it enacted an express form in which bills of sale in future were to be made, a form which was to be intelligible to the ordinary borrower, intended the provisions of another Act of Parliament to be incorporated. The enactment of the express form negatives, and, if, as we think, a power of sale by implication is given by the Act itself, is inconsistent with such a conclusion. But it is said that, without the power of sale in the Conveyancing Act, and unless that power is conferred on a mortgagee under the statutory form, there is no power of sale. We do not think the mortgagee requires the aid of the Conveyancing Act. The true reading of s. 7 appears to us to be, that chattels assigned under a bill of sale shall be seizable in any of the five cases mentioned in that section, and may be sold five days after seizure, unless the grantor apply to the Court, and satisfy the Court that, by payment of the money or otherwise, the cause of seizure no longer exists; in which case the Court may restrain the grantee from removing or selling the chattels. When it is said that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following reasons, it *must* mean that they *may* be seized or taken possession of in the following cases. When subsequently in the section it is said that the grantor may within five days after seizure restrain the grantee from removing or selling the chattels, it must mean that he is to have a power to sell. In our opinion there is no occasion to insert in the form a power to take possession of, to sell, or to redeem. These powers are given by the Act itself, and need not appear in the form. But, again, when s. 13 says that goods shall remain on the pre-

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mises when seized or taken possession of, and shall not be removed or sold until after the expiration of five days, surely it means that they *may* be sold after that time; it gives a power to sell five days after the goods are taken possession of. We cannot understand how any different construction can be put on this section. If we are right, here, too, is a power of sale impliedly given by the Act. But, if a power to sell is not given by the Act, the mortgagee gets it in another way. A power to seize clearly may be inserted in the form, because it is a provision for the maintenance of the security. The mortgagee can then seize under it. Having the possession of the goods, he may, as assignee of them, sell, subject to any right in the grantor to redeem. But the right to redeem must be exercised within five days, to prevent a sale by the mortgagee. If it is not, we are of opinion that the mortgagee has, at law and in equity, a right to sell, and can give an unimpeachable title to a purchaser. For the reasons given we do not think the provisions introduced into this bill of sale invalidate it, as they do not alter its legal effect so as to make it not in accordance with the form in the schedule to the Act. We think the Divisional Court right, and the appeal must be dismissed.

Appeal dismissed.

Solicitor of Official Receiver: *W. Murton, Solicitor to Board of Trade.*

Solicitors for grantees: *Williamson, Hill, & Co., agents for T. & H. Greenwood Teale, Leeds.*

W. L. C.
E. L.

PFEIFFER *v.* THE MIDLAND RAILWAY COMPANY. 1886 Nov. 26.

Practice—Motion for New Trial—Misdirection—Statement of Grounds in Notice of Motion—Ord. XXXIX., r. 3.

A notice of motion for a new trial on the ground of misdirection should state how and in what matter the judge misdirected the jury.

MOTION for a new trial on the ground (inter alia) of misdirection.

The action was for negligence, and was tried before Lord Coleridge, C.J., and a jury, and a verdict found for defendants.

Oswald, for the plaintiff.

[THE COURT called attention to the fact that the grounds of misdirection were not stated in the notice.]

It is unnecessary to state them. The effect of the whole summing-up was misdirection. The notice need only set forth "the grounds of the application:" Order XXXIX., r. 3. Those grounds, which are "misdirection" and others, appear in the notice. But if not, the Court is now asked to allow the plaintiff to amend the notice by adding grounds.

Carter, for defendants. No objection to the summing-up was taken at the trial.

HUDDLESTON, B. This may be a question of considerable importance. The only objection stated in the original notice of motion was "misdirection." We consider that is too vague. The Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 33, provided that "In every rule nisi for a new trial, or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein," and it was held by the Court of Exchequer in *Drayson* v. *Andrews* (1) that a rule for a new trial on the grounds stated in affidavits and depositions was not sufficient, and that the grounds themselves should have been stated. When the Judicature Act passed it was pointed out that the parties who were to shew cause without a rule nisi would have no means of knowing what grounds they had to meet, and it was answered

(1) 10 Ex. 472; 24 L. J. (Ex.) 22.

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that under Order XXXIX., r. 3, "Every application for a new trial shall be by notice of motion. . . . The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of." Therefore it is clear that the grounds should have been stated, and it is idle to say generally in the notice of motion that the learned judge misdirected the jury; the notice must state how and in what matter the jury were misdirected. So the original notice of motion is bad. We have, indeed, power under Ord. XXXIX., r. 5, to amend the notice of motion, but the exercise of that power is in our discretion; and when we see that the grounds suggested are absurd, or do not go to the ground of the inquiry or of the right in question, the amendment should not be made.

MANISTY, J., concurred.

Motion dismissed.

Solicitor for plaintiff: *W. Medcalf.*
Solicitors for defendants: *Beale & Co.*

J. R.

Nov. 22.

HYDE *v.* BEARDSLEY.

Practice—Reference of Action to Arbitration—Costs to abide Event of Award—Award for less than 50*l.*—*Order for Costs—Order LXV., r.* 12.

Where an action of contract has been referred to arbitration under an order by consent providing that the costs of the action shall abide the event of the award, and the sum awarded to the plaintiff does not exceed 50*l.*, a judge at chambers has power under Order LXV., r. 12, to order that the costs shall be taxed upon the scale applicable to actions of contract where the sum recovered exceeds 50*l.*

MOTION on appeal from an order of Day, J., at chambers, that the costs of the action be taxed upon the scale applicable to actions of contract where the sum recovered exceeds 50*l.*

The action was in contract to recover 48*l.* 3*s.* The counterclaim was for 77*l.* After reply, an order was made by consent to refer the action to arbitration, and that the costs of the action, reference, and award should abide the event of the award.

The arbitrator awarded 48*l.* 3*s.* to the plaintiff on his claim, with costs as to that sum, and 6*l.* 5*s.* to the defendant on his

counter-claim, with costs as to that sum. The plaintiff proceeded to tax costs and obtained the order appealed against.

Edward Pollock, for the defendant. The order was made under Order LXV., r. 12, but the learned judge had no power to make such an order. The action being referred to arbitration, the proceedings were practically removed from the High Court except for the purpose of signing judgment, and the jurisdiction over costs was taken away: *Wimshurst* v. *Barrow Shipbuilding Co.* (1) The plaintiff may rely upon *Fergusson* v. *Davison* (2), where after a reference in similar terms, the plaintiff recovered less than 20*l.*, and the Court held that he was deprived of costs; and Brett, L.J., no doubt said: "It seems to me that the sum was recovered in an action by judgment." But this statement was unnecessary for the decision of the case.

Macaskie, for the plaintiff. The action remained in the High Court, though the amount recovered was found by an arbitrator instead of a jury. Order LXV., r. 12, applies. *Wimshurst* v. *Barrow Shipbuilding Co.* (1) is not in point, for in that case the parties had agreed that there should be no costs, and the order of reference was silent as to costs. In *Fergusson* v. *Davison* (2) the Master of the Rolls says "the sum was recovered in an action by judgment," and that was the ground of the decision, and not a mere obiter dictum. The terms of 30 & 31 Vict. c. 142, s. 5, the County Courts Act, 1867, are practically identical with the language of rule 12, and in cases on the earlier County Courts Act, 13 & 14 Vict. c. 61, s. 11, a plaintiff who recovered under a similar reference less than 20*l.* was deprived of his costs unless he got a certificate: *Smith* v. *Edge* (3); *Cowell* v. *Amman (Aberdare) Colliery Co., Limited.* (4) Here the plaintiff has obtained the necessary order.

Edward Pollock, replied.

MANISTY, J. This appeal fails. The case is not exactly similar to *Wimshurst* v. *Barrow Shipbuilding Co.* (1) It is an action of contract referred to arbitration under an order by consent, the

(1) 2 Q. B. D. 335.
(2) 8 Q. B. D. 470.
(3) 33 L. J. (Ex.) 9.
(4) 34 L. J. (Q.B.) 161.

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costs to abide the event. The question is, first, what would have been the result if the action had been tried? No doubt if the action had been tried, the Order as to county court costs would apply. Secondly, if that Order does apply, has the plaintiff a right to obtain an order under the Judicature Act and rule referred to?

On the authorities, especially on *Cowell* v. *Amman Colliery Co.* (1), (which is not opposed to *Wimshurst* v. *Barrow Shipbuilding Co.* (2)), if an action is referred costs to abide the event, and judgment ultimately recovered in the High Court, then Order LV. of the old orders, and Order LXV., r. 12, of the new orders, apply to the case. Unquestionably it is within the words of the latter rule, which are quite large enough to include it. It is true that the judgment was obtained through the medium of an award, but it was recovered in the High Court for a sum not exceeding 50*l.*, and seeing that in this case the plaintiff would be deprived of costs unless the judge certified, surely unless there be authority binding us to the effect that this case does not come within Order LXV., r. 12, we ought to hold that it does. The only case cited as an authority against it is *Wimshurst* v. *Barrow Shipbuilding Co.* (2) But in that case the parties had agreed that there should be no costs. The Court did indeed point out that the parties had put themselves under the terms of the Common Law Procedure Act, and not under the Judicature Act; but there the order of reference was silent as to costs, and the case is on that ground essentially distinguishable. Subject to that one authority, the right construction of the Act and rule is in favour of the order made, and I think, therefore, this motion should be refused.

A. L. SMITH, J. I am of the same opinion. If Day, J., had jurisdiction under the Order, his discretion at chambers having been exercised as to costs is not the subject of an appeal. By the submission to arbitration the costs of the cause and of the reference were to abide the event. The question is, whether on such a submission as that the learned judge at Chambers had jurisdiction to order the plaintiff costs as if he had recovered more

(1) 34 L. J. (Q.B.) 161. (2) 2 Q. B. D. 335.

than 50*l.* in an action of contract? *Wimshurst* v. *Barrow Shipbuilding Co.* (1) is clearly distinguishable, and even if there was no other authority, I should have said that it did not govern this case, because the Court there held that by the submission to the arbitrator the parties had agreed that there should be *no* costs in any event, and therefore neither party should have costs. But this order of reference is different. The costs of the cause and the reference are to abide the event. That means abide the event according to law. If the plaintiff recovers less than 50*l.* he shall not have High Court costs unless the judge orders them. But the opinion of the Master of the Rolls in *Fergusson* v. *Davison* (2) was, that "the sum was recovered in an action by judgment," although recovered by means of an award, and therefore the words of the County Courts Act applied, and he added that the decision did not apply "to the case in which an arbitrator has made an award under a reference where no action has been commenced." Of course not. I entirely agree with the rule laid down in *Smith* v. *Edge* (3) that, "wherever the plaintiff is entitled to judgment in the action, and the case is such that if there had been no reference the plaintiff would, by virtue of the County Courts Act, have lost his costs in the cause, so does he equally lose them when there is a reference which fixes the amount, unless he has succeeded in getting the necessary certificate." (4) Why? Because there has been judgment in the action. Then Order LXV., r. 12 says, that "in actions founded on contract in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to, had he brought his action in a county court, unless the Court or a judge otherwise orders." Here a judge has otherwise ordered.

Appeal dismissed with costs.

Solicitors for plaintiff: *Mackeson, Taylor, & Arnould.*
Solicitors for defendant: *Goldberg & Langdon.*

(1) 2 Q. B. D. 335.
(2) 8 Q. B. D. 470.
(3) 33 L. J. (Ex.) 9.
(4) At pp. 12, 13.

J. R.

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Nov. 4.

THE QUEEN *v.* JUSTICES OF KIRKDALE.

Inn—Beerhouse—Sunday closing—Insertion of Condition in Licence—35 & 36 Vict. c. 94, s. 49.

The condition under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 49, requiring the licensed premises therein mentioned to be closed during the whole of Sunday, can only be inserted in a new licence if the applicant for it himself applies to the licensing justices to insert such condition.

Motion on behalf of the Rev. R. F. Smethwick and others for a rule calling upon justices of Kirkdale to shew cause why they should not hear and determine the application of William Parry and Mary Welsh for seven-day licences to sell beer by retail in place of six-day licences.

At the general annual licensing sessions for the Kirkdale division of Lancashire six-day licences held by William Parry and Mary Welsh respectively, being unopposed, were renewed, with other unopposed licences, in the usual course of the business of the sessions. Afterwards, amidst applications for new licences, Parry and Welsh duly applied for seven-day licences instead of the six-day licences. Opposition to the application was offered by the Rev. R. F. Smethwick and other inhabitants of the neighbourhood, who objected to the sale of liquors on Sunday, but the justices held that they had no discretion to insert the six-day condition into the licences demanded unless the applicants asked for it, and therefore refused to hear the objectors, and granted seven-day licences.

S. Little, in support of the motion. The justices have not properly heard and determined the question, for they refused to hear the opposition to the licence.

By 35 & 36 Vict. c. 94, s. 49, where on the occasion of an application for a new licence or transfer, or renewal of a licence . . . the applicant at the time of his application applies to the licensing justices to insert in his licence a condition that he shall keep the premises . . . closed during the whole of Sunday, the justices shall insert the said condition in such licence.

If once the condition is inserted at the request of the applicant the justices may on subsequent applications for renewal decide

whether the condition shall be withdrawn or not. The holder of a six-day licence under s. 49 is not entitled on the renewal of his licence to exchange it for an ordinary or seven-day licence: *Reg.* v. *Recorder of Dublin* (1); *Reg.* v. *Cathcart.* (2) For otherwise, as May, C.J., pointed out in *Reg.* v. *Recorder of Dublin* (3), "It is quite conceivable that an applicant for a new licence might get rid of opposition by electing to take a six-day licence, and if he, on the next occasion of renewal, is to be permitted at his pleasure to substitute a general licence for that accorded to him, it is plain the licensing authorities would be deceived."

LORD COLERIDGE, C.J. We must base our decision on the exact state of the case before the justices, which was this: There had been, it seems, a rather perfunctory renewal of the old licences with the six days condition inserted in them. Subsequently there was an application for new licences under 35 & 36 Vict. c. 94, s. 49, and it is said that s. 49, under the circumstances, gives the justices discretion on the application for a new licence—not only to withhold it—but, of their own motion and will to insert in the new licence they are then for the first time granting a condition which the applicant has not applied for. I think the words of s. 49 are clear and that where an application for a licence has been granted, or is to be, and is intended to be granted, it is only at the instance of the applicant that such a condition can be imposed. Here therefore the justices could not impose a limitation except in circumstances which did not arise, viz., a request by the applicant himself. It is at least doubtful whether if the matter had arisen on renewal in the old shape, the justices could, on a mere application for a renewal of the old licence, have inserted such a condition. With all respect to the views of the learned judges in Ireland, I very much doubt whether the justices could have inserted such a condition, but the facts here do not raise that point, and I do not decide it.

The question now before us is, whether the justices have a right on any application, except that of the applicant himself, to insert such a condition. We decide that, on an application for a new licence, they have no such right.

(1) 2 Law Rep. Ir. 385. (2) 4 Law Rep. Ir. 567.
(3) 2 Law Rep. Ir. at p. 388.

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MANISTY, J. Difficulty has arisen from not keeping in view the difference between renewal of an old licence and the grant of a new one. Sect. 49 applies: "Where on the occasion of an application for a new licence or transfer or renewal of a licence" —which must mean of an existing licence—the applicant at the time of his application applies to the licensing justices to insert in his licence a condition." The preceding s. 48 shews how the renewal is to be effected, viz. (subs. 2), by an indorsement on the licence, or by the issue of a copy of the old licence. That is a continuation of the existing licence. But when an application is made for a new licence—which, in substance, is the present case,—we need not trouble ourselves about renewal, but confine our judgment to the new licence.

Motion refused.

Solicitor for applicant: *A. Wilson, Liverpool.*

J. R.

Dec. 9.

[IN THE COURT OF APPEAL.]

SWINDELL AND OTHERS *v.* BULKELEY AND OTHERS.

Practice—Death of Defendant—Fresh Action against Executors—Statute of Limitations (21 *Jac.* 1, *c.* 16)*—Equity of the Statute—Order VIII.—Order XVII.*

A writ was issued, but before it was served the defendant died. Within a year from the proof of the will by the executors of the deceased, a fresh writ was issued against them for the same cause of action. In the meanwhile the period of statutory limitation had expired:—

Held, that the executors could not rely on the Statute of Limitations as a defence to the action.

APPEAL from the judgment of Day, J., in favour of the plaintiffs at the trial without a jury.

It appeared that a bill for 2000*l.* was accepted by Bulkeley falling due on the 22nd of October, 1877. A part of the amount was paid at the date of maturity. Within six years, that is, on the 17th of October, 1883, a writ was issued against Bulkeley to recover the balance. Bulkeley died on the 27th of January, 1884, and at that time the writ had not been served. On the 21st of May, 1884, his will was proved by the defendants, his executors, and a claim was made on them for payment on the

9th of June in the same year, which they rejected. On the 27th of November in the same year the writ in the present action was issued against the defendants. At a subsequent period the then plaintiff died, and the action was continued by the present plaintiffs as his executors.

The learned judge held that the claim was not barred by the Statute of Limitations (21 Jac. 1, c. 16, s. 3), and gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Channell, Q.C., and *Jason Smith*, for the defendants. By an equitable construction of the Statute of Limitations the Courts extended the operation of s. 4 to a case not mentioned in it. But the reason for this was the abatement of the first action by no fault of the plaintiff: 2 Wms. Saunders, 64 a; *Kinsey* v. *Heyward* (1); *Curlewis* v. *Mornington*. (2) But here the death of the defendant did not abate the action. It continued alive subject to this, that some step must be taken to put some one else on the record in lieu of the deceased. An executor is not entitled to time in which to bring an action where the testator might have brought one at any time up to his death, and the period of limitation expires afterwards: *Rhodes* v. *Smethurst* (3); *Penny* v. *Brice* (4); because no action has been lost by reason of the death. If any right of action is lost in such case the loss is due to the want of diligence of the testator, and not to time running against a person who can do nothing to prevent it, according to the expression used in *Sturgis* v. *Darell*. (5) Here the plaintiff in the first action was not prevented from serving his writ but chose to abstain from doing so and ran the risk of his action failing for non-compliance with the Judicature Rules. Under these rules the action did not abate on the death of the defendant, but when it was discovered who the executors were, it might have been continued against them: Order XVII.; and the writ might have been renewed under Order VIII. on proof of reasonable efforts to serve it. That was not done, and the writ became inoperative as

(1) 1 Ld. Raym. 432; sub nom. *Hayward* v. *Kinsey*, 12 Mod. 568.

(2) 7 E. & B. 283; 26 L. J. (Q.B.) 181, and in Ex. Ch. 27 L. J. (Q.B.) 439.

(3) 4 M. & W. 42.

(4) 18 C. B. (N.S.) 393.

(5) 4 H. & N. 622; 6 H. & N. 120.

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the commencement of an action, and consequently was no bar to the statute running. If this case depends on the doctrine of journeys accounts, it is clear from *Spencer's Case* (1) that that did not apply when the plaintiff was in default. The reason for what is in effect an addition to s. 4 of the statute no longer exists, and consequently the equity of the statute, under which the mischief aimed at by the statute was dealt with though not expressly named, is no longer applicable.

Lumley Smith, Q.C., and *Muir Mackenzie*, for the plaintiffs. The 4th section of the statute must be read as if it included this case of a defendant dying pending an action against him. In *Adam* v. *Inhabitants of Bristol* (2), Lord Denman explains the origin of what is termed the equity of the statute. The doctrine has not been affected by the Common Law Procedure Act or the Judicature Acts and Rules. All the plaintiffs have to shew is that an action was pending, and since every action is to be commenced by writ (Order II. r. 1), it is only necessary to shew that the death occurred while there was an effective writ in existence. That was the case here, and on the death of the defendant the plaintiff was entitled to commence a fresh action, and this action having been brought against the defendants within a reasonable time from their appointment as executors the statute is no answer to it.

Channell, Q.C., in reply. The point in dispute is what words are to be read into s. 4. That is to be gathered from the cases, and it is submitted that the exception is correctly expressed by the words of Wightman, J., in *Sturgis* v. *Darell* (3): "If an action be duly commenced within the time limited by the statute and afterwards abates without any default of the plaintiff, a second action, commenced within a reasonable time after the abatement, shall be considered as a revival of the first."

LORD ESHER, M.R. I am of opinion that the judgment was right and that this appeal must be dismissed.

The case does not seem to me to depend on the doctrine of journeys accounts. What we have to consider is the Statute of Limitations, which more than 200 years ago was brought before

(1) 6 Rep. 275. (2) 2 Ad. & E. 389. (3) 6 H. & N. at p. 121.

the Courts, and a construction put on the 4th section. It is said that judges of the present day if they had now to construe the statute for the first time would not put the same construction on it, but that is immaterial, for the Courts have said that they cannot now overrule a decision which has been acted upon so long, and as long as the statute exists that is the construction that must be put on it. What is that construction? There are certain cases specified in s. 4 which alleviate to a certain extent the rigidity of s. 3, and the rule is that among those cases there must be included by necessary implication that of a person who commences an action against another within the period of limitation and then that other dies. In such a case the creditor may within a reasonable time bring another action, and this remedy would not be barred by s. 3. It follows that until this reading of the statute is altered by paramount authority, the construction is as if this exception had been written into s. 4. The judges gave certain reasons why they put this construction on the statute, some gave one and some another, but the fact that the reasons given for the construction have now no force does not alter the construction. It is said that the Common Law Procedure Act did away with the reasons for the construction, but it seems to me not to have touched the point. It is then said that the Judicature Acts and Rules have done the same, but I think that though they have given a remedy for the evil there is nothing in them affecting the existing remedy. It seems to me incorrect to say that the mere giving of a new remedy directed to the lessening of costs takes away the existing remedy. The Judicature Acts and Rules did not alter rights but dealt with procedure. They have not affected this statute, and there is nothing in them which prevents a person bringing a new action under circumstances in which he could have before brought such a new action.

The rule was that where an action was commenced within the period of limitation and the defendant died then the plaintiff had a right to bring a new action against the executor or administrator if he did so in a reasonable time. That is what has happened here. An action was commenced by the issuing of a writ. It was at first said that this was not a commencement

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of the action, but that was abandoned, and it was then said that the plaintiff must revert by reason of things not having been afterwards done to such a position as he would have been in if the action had not been commenced. I cannot agree to this. When the defendant died the plaintiff had a right within a reasonable time, certainly within a year, to commence a new action against the executors, and as he has done so the Statute of Limitations is no bar to this claim.

LINDLEY, L.J. In this case an action was commenced by writ within the time limited by the statute. It was not served on the defendant, but it might have been at any time before he died. When he died the writ was a valid writ, not a spent one, and the action was in every sense a pending one. After the death of the defendant this new action was commenced against his executors. It is impossible to get over the series of decisions which have grafted an exception on the 4th section of the Statute of Limitations. The question is, what is that exception? Mr. Channell puts it that it applies only to the case of an action abating, but that is sacrificing substance to form. What has happened is the death of the defendant, which has embarrassed the plaintiff in pursuing his action. That is exactly the case of *Curlewis* v. *Mornington* (1) and *Sturgis* v. *Darell* (2), and when we find that a judicial interpretation of the statute includes these cases we are bound thereby. It is said that before the Common Law Procedure Act the action could not have been sustained, because the writ in the original action was never served, and reliance is placed on *Kinsey* v. *Heyward* (3), which is reported in several reports. But from the long report of that case in 12 Modern Reports, 568, I do not understand that the decision proceeded on the ground that the writ had not been served, but it appeared to have been expressly based on the fact that there was no proof of the entry of all the continuances. So far as I can make out, the mere fact that the writ was not served is immaterial. I wish to avoid saying what my decision would have been if at the

(1) 7 E. & B. 283; 26 L. J. (Q.B.) 181, and in Ex. Ch. 27 L. J. (Q.B.) 439.

(2) 4 H. & N. 622; 6 H. & N. 120.

(3) 1 Ld. Raym. 432; sub nom. *Hayward* v. *Kinsey*, 12 Mod. 568.

death of the defendant the writ had been a spent writ. This is an exceptional case not provided for by the Rules, but coming within the interpretation, to my mind a forced interpretation, which has been put on the 4th section of the statute of James.

LOPES, L.J. I am of the same opinion. The cases shew that when an action was commenced and the plaintiff died during the pendency of the action, his representatives, if the cause of action was one that survived to them, might commence a new action within a reasonable time notwithstanding the period of limitation had expired, and in the case of the death of a defendant the plaintiff might commence a new action within a reasonable time after probate of the will or grant of administration. That appears to have been the rule up to the passing of the Common Law Procedure Act, 1852. One may perhaps venture to say that the judges took rather a liberty with the statute, but I presume the origin of the doctrine is to be found in the hardship inflicted in particular cases on the litigant or his estate through no fault of his own by a rigid adherence to the terms of s. 4. The Common Law Procedure Act enacted that in such cases the action should not abate, and that provision has been repeated in Order XVII., r. 1. For some time I was inclined to think that those enactments had altered the state of things which previously existed, and that the maxim cessante ratione cessat lex applied. I think, however, on consideration that now either of two courses may be taken in such cases, and the cause of action may be enforced either by relying on the equity of the statute to support a new action or by following the provisions of the Judicature Rules to keep alive the old one.

Appeal dismissed.

Solicitor for plaintiffs: *Oliver Richards.*

Solicitors for defendant: *R. S. Taylor, Son, & Humbert.*

A. M.

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CROSSMAN AND ANOTHER *v.* THE QUEEN.

Dec. 10, 21.

Revenue—Stamp Duties on Accounts—Voluntary Settlement—Reservation of Life Interest—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*).

By deed dated the 12th of July, 1883, the settlor, in pursuance of a power given by articles of partnership, appointed and transferred to his sons his shares in the partnership business, as from the 1st of October, 1883, or as from the settlor's death, which should first happen, provided that such appointments were conditional upon the execution by the sons before the 1st of October, 1883, of a deed covenanting to pay to the settlor, from the 1st of October, 1883, during his life, interest at 4 per cent. per annum on the value of the shares appointed as aforesaid, and to pay, out of the profits, certain annuities to other persons.

The sons executed this last-mentioned deed on the 12th of July, 1883.

The settlor died on the 19th of July, 1883:—

Held, that the transfer of the shares was a voluntary settlement within the meaning of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2, and that by it an interest for life in the property transferred was reserved to the settlor, and therefore duty was payable under that section on the amount of the shares so transferred.

SPECIAL CASE stated pursuant to the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), and Rules of Supreme Court, 1883, Order XXXIV., r. 1.

The suppliants were sons of Robert Crossman, who died on the 19th of July, 1883.

The petition was presented to recover the sum of 3777*l.*, which the suppliants (as they alleged by mistake) had paid to the Commissioners of Inland Revenue, being 3 per cent. on 125,823*l.* 10*s.*, the assumed value of two shares in a business, to which the suppliants had become entitled under certain indentures, the material provisions of which are set out in the judgment of the Court, where the facts appearing on the special case are also stated, and the clause in the Customs and Inland Revenue Act, 1881, 44 & 45 Vict. c. 12, s. 38, sub-s. 2 (*c*), on which the decision turned is set out.

The questions for the opinion of the Court were—

1. Were stamp duties on accounts payable by the suppliants under s. 38 of the Customs and Inland Revenue Act, 1881? or, if no duty was payable under the said section,

2. Was succession duty payable by the suppliants?

Dec. 10. *Sir Horace Davey, Q.C.*, and *Danckwerts*, for the suppliants.

Sir Richard Webster, A.G., and *Dicey* (*Sir Edward Clarke, S.G.*, with them), for the Crown.

The arguments are stated in the judgment.

The following authorities were referred to: *Bullock* v. *Sadlier* (1); *Re Jenkinson* (2); *Attorney General* v. *Baker* (3); *Floyer* v. *Bankes* (4); *Townend* v. *Toker* (5); *Partington* v. *Attorney General, judgment of Lord Cairns* (6); *Bayspoole* v. *Collins* (7); *Fryer* v. *Morland* (8); *Price* v. *Jenkins* (9); *Attorney General* v. *Noyes* (10); *In re Ridler, Ridler* v. *Ridler* (11); *Lord Advocate* v. *McKersies* (12).

Cur. adv. vult.

Dec. 21. The judgment of the Court (Denman and Hawkins, JJ.), was read by

HAWKINS, J. The question in this case is whether the suppliants, James Hiscutt Crossman and Alexander Crossman, are liable to pay stamp duties on accounts under s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, 44 & 45 Vict. c. 12, or succession duty under s. 2 of the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, in respect of the shares and interests they took from Robert Crossman, their father, deceased, under a deed of grant and assignment dated the 12th of July, 1883. It was agreed upon the argument before us that, if liable to the stamp duties, 3 per cent. upon the value of such shares was the proper amount to be charged; if to succession duty one per cent. only. In fact the suppliants had in January, 1884, paid the full amount of 3 per cent., but it was arranged that if neither duty was chargeable the whole of that sum should be refunded; if succession duty only was payable, then that two-thirds, representing 2 per cent. overpaid, should be returned,—in either case with interest at a rate to be fixed by the Court. But if stamp duty was chargeable then no part of the amount was to be repaid.

(1) Amb. 764.
(2) 24 Beav. 64.
(3) 4 H. & N. 19.
(4) 3 D. J. & S. 306.
(5) Law Rep. 1 Ch. 446.
(6) Law Rep. 4 H. L. 100, 122.
(7) Law Rep. 6 Ch. 228.
(8) 3 Ch. D. 675.
(9) 5 Ch. D. 619.
(10) 8 Q. B. D. 125.
(11) 22 Ch. D. 74.
(12) 19 Scottish Law Reporter, 438.

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Hawkins, J.

The material facts may be shortly stated, though set out at length in the case.

For many years before the 1st of October, 1873, Robert Crossman, Thomas Mann, James Hiscutt Crossman, and William Thomas Paulin, had carried on the business of brewers in partnership, under the firm of Mann, Crossman, & Paulin. It was in that year determined to dissolve that partnership, and reconstruct it by admitting into it Alexander Crossman, another son of Robert Crossman (also a suppliant), and Thomas James Mann.

To carry out this object an indenture of partnership, bearing date the 1st of October, 1873, was executed between all the old and the intended new partners.

By the terms of that deed the partnership was to exist for twenty-one years from the 27th of September then last (that is until the 27th of September, 1894.)

The intended capital of the partnership was 400,000*l.*, divided into eight shares of 50,000*l.* each, of which two were to belong to Robert Crossman, two to Thomas Mann, and one each to James Hiscutt Crossman, Alexander Crossman, Thomas James Mann, and William Thomas Paulin.

The capital of the old partnership, taken to be of the value of 320,395*l.*, was brought into the new one, and it was treated as having been brought in by, and belonging, as to 100,000*l.*, to Robert Crossman in respect of his two shares, as to 100,000*l.*, to Thomas Mann in respect of his two shares, and as to the residue, 120,395*l.*, as having been brought in by James Hiscutt Crossman, Alexander Crossman, Thomas James Mann, and William Thomas Paulin, in equal shares, viz. 30,098*l.* 15*s.*, leaving a balance of 19,901*l.* 5*s.*, to be thereafter brought in by each of the four last-named partners.

Out of the net profits of the business one-fifth was to be set apart as a reserved fund to answer the future occasions of the business; but it was to be taken to belong to the partners in proportion to the amounts of their shares respectively.

By clause 36 of the deed it was thus provided: "That it shall be lawful for any of them the said Robert Crossman, Thomas Mann, James Hiscutt Crossman, Alexander Crossman, Thomas James Mann, and William Thomas Paulin, during the continuance of the partnership, either by deed or will to appoint, give,

and make over to any one or more of his sons or grandsons, being of the age of twenty-five years or upwards, any part or parts of his own shares or share in the partnership business (not being less than one-eighth share of the whole for any one person without the consent or approval of the other partners)."

Between 1879 and 1883 negotiations no doubt took place between Robert Crossman and the suppliants with reference to the transfer to them of the said Robert Crossman's two shares in the business, but there was no finally concluded arrangement for such transfer until the execution of the deeds of the 12th of July, 1883, next mentioned.

We mention these negotiations (which are referred to in par. 5 of the case), because they were in the course of the argument suggested as having a bearing upon the matter for our consideration. We do not, however, think they in the least degree affect the legal questions before us, which must be determined by the view we take of the final arrangement come to, and which was embodied in the deeds of the 12th of July, 1883, which we now proceed to consider.

By the first of these deeds, being an indenture dated the 12th of July, 1883, made between Robert Crossman of the first part, the suppliant James Hiscutt Crossman of the second part, and the suppliant Alexander Crossman of the third part, after reciting that the said Robert Crossman was desirous of making such appointment as was thereinafter contained in favour of his sons, the said James Hiscutt Crossman and Alexander Crossman, both of whom had attained the age of twenty-five years, It was witnessed that he the said Robert Crossman, in exercise of the power given him by the articles of partnership, &c., did thereby appoint, give, make over, grant, and assign unto the said James Hiscutt Crossman, as from the 1st day of October, 1883, *or as from the death of him the said Robert Crossman, which shall first happen*, one of his said one-eighth shares in the said partnership business and the capital thereof, and the reserved fund and the accumulations thereof, and all moneys forming part of or due in respect of the said share, and the full benefit thereof, to hold the same unto the said James Hiscutt Crossman, his heirs, executors, administrators, and assigns, for his and their own use and benefit.

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In similar language the said Robert Crossman appointed his other one-eighth share to his son the said Alexander Crossman.

Then follows a proviso that the appointment and disposition intended to be thereby made was conditional on the execution by the said James Hiscutt Crossman and Alexander Crossman of the indenture we are next about to mention, viz., a second indenture and deed of covenant, dated also the 12th of July, 1883, between James Hiscutt Crossman of the first part, Alexander Crossman of the second part, and Robert Crossman of the third part, and that if the said James Hiscutt Crossman and Alexander Crossman respectively, or either of them, should refuse or neglect to execute the said indenture of covenant before *the 1st day of October then next*, the appointment and disposition intended to be made should, as regarded the shares or share of the said James Hiscutt Crossman and Alexander Crossman, or such one of them as should neglect or refuse to execute the said deed of covenant as aforesaid, be absolutely void.

By the said second indenture of the 12th of July, 1883, being a deed of covenant between the said James Hiscutt Crossman of the first part, the said Alexander Crossman of the second part, and the said Robert Crossman of the third part, after reciting, inter alia, the last mentioned indenture, and that in consideration of the appointments and dispositions made by that indenture the said James Hiscutt Crossman and Alexander Crossman had respectively agreed to enter into such covenants as were thereinafter contained *for the purpose of securing to the said Robert Crossman during his life interest at the rate thereinafter mentioned on the value of the shares so appointed and assigned to them* respectively as aforesaid, and for the purpose of securing annuities after the death of Robert Crossman to the widow and another son of the said Robert Crossman, payable out of the net profits received in respect of the said shares, It was witnessed, that in pursuance of the said agreement and in consideration of the appointments and dispositions made by the last mentioned indenture, each of them the said James Hiscutt Crossman and Alexander Crossman, so far as related to the share appointed to him, did covenant with Robert Crossman, his executors and administrators, that if the said Robert Crossman should be

living on the 1st day of October then next, each of them the said James Hiscutt Crossman and Alexander Crossman would pay to the said Robert Crossman, during his life, interest at the rate of 4 per cent. per annum on the value of the share so appointed to him as aforesaid, as such value should appear by the books of the said partnership on the 1st day of October then next, *such interest to commence from that day*, and be paid half-yearly, the first payment to be made on the 1st of April, 1884. Then follow covenants for the payment to the widow and the other son of the annuities provided for them.

Robert Crossman died on the 19th of July, 1883, just one week after the indentures of appointment and covenant were made.

The value of the two shares so appointed is assumed to be 125,823*l.* 10*s.* Three per cent. upon that sum, amounting to 3777*l.*, has, as already mentioned, been paid by the suppliants, as they allege, under mistake.

The case was argued before us on the 10th of December, when, the case being of considerable general importance, we took time to consider our judgment.

We propose to deal first with the question whether the stamp duties were payable, because our decision upon that question will practically determine the case.

By the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, it is provided that stamp duties in lieu of probate or letters of administration duty at certain specified rates shall be charged and paid on accounts delivered under that Act to the Commissioners of Inland Revenue of the personal or moveable property to be included therein.

By sub-sec. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.," inter alia, "(*c*) any property passing under any past or future *voluntary settlement* made by any person dying on or after such day" (viz. 1st of June, 1881), "by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved, either expressly or by implication, to the settlor." The rest of the sub-section is immaterial to the question we have to decide.

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That the shares in question passed to the suppliants under the first of the indentures of the 12th of July, 1883, was not, and of course could not be, disputed, nor could it be disputed that the suppliants were bound by their covenants in the second of those indentures to pay the interest and annuities as therein mentioned.

For the Crown it was contended that the settlement was voluntary; on the other hand it was urged by the learned counsel for the suppliants that there was good consideration for the deed, inasmuch as the covenants to pay the interest of 4 per cent. during the life of Robert Crossman were absolute covenants, not dependent upon the future prosperity of the business, that there being such good consideration and no question as to the bona fides of the transaction, the settlement would have been good as against a subsequent purchaser, and for that reason could not be treated as a voluntary deed. They urged, moreover, that so long as the consideration was a good one the quantum or adequacy of it was immaterial.

In dealing with the questions before us it must be observed that they arise upon a statute having a totally different object to that of 27 Eliz. The object of the statute of Elizabeth was to render void, as against subsequent bonâ fide purchasers, conveyances with intent to defraud. But s. 4 of that Act provides that it shall not extend to make void any conveyance to be made for good consideration and bonâ fide to any person.

The object of the statute under which the stamp duty in question is imposed is not to avoid a voluntary conveyance by reason of its fraudulent character, or at all, but simply to prevent a voluntary conveyance, however bonâ fide, where an interest in the property for the life of the settlor is reserved, from operating so as to deprive the Crown of those duties which, but for the conveyance, would undoubtedly have been payable upon the death of the settlor.

In considering the question whether a settlement is voluntary or not according to the true construction of the Customs and Inland Revenue Act, 1881, we think it is incumbent upon us to look at the real substance of the transaction and its object; and if so looking at it we come to the conclusion that in its origin it was intended to be a free gift to the transferees, but only upon

the condition that the settlor should substantially retain to himself the interest in the property for his life, we ought to find the settlement to be voluntary within the meaning of the Act, even though on the face of the deed, and in fact, we may find that there was sufficient consideration to support a contract between the parties, and to take it out of the operation of the statute of 27 Eliz. as regards a subsequent purchaser. In other words, it does not in our opinion follow of necessity that because a settlement may be valid as against a subsequent purchaser it cannot be a voluntary settlement within the meaning of the Act of 1881. The character and amount of consideration for the settlement are no doubt very important elements to be taken into account, as also are the relations of the parties. Nobody would dream of calling that a voluntary deed which was executed upon substantial pecuniary or other consideration moving from the transferee, whether such transferee were a son of the settlor or a stranger,—but a totally different view might reasonably be taken if the amount of consideration, though sufficient to support a contract, was palpably inadequate to the value of the property transferred, and the transferee was a near and dear relative of the settlor.

We were urged to consider the language of par. 5 in the case, which speaks of negotiations between the parties, and treats the indentures in question as the result of a "bargain" between the parties; this we have done, but it does not affect our judgment, for "a bargain" is only another name for "a contract," which may exist upon the slightest valuable consideration. The mere existence of a legal contract for a settlement is not in our opinion the test whether the deed is voluntary or otherwise.

All the authorities cited by the learned counsel for the suppliants upon this part of the case were upon questions arising under the statute of Elizabeth. *Townend* v. *Toker* (1) was chiefly relied on for the purpose of shewing that the quantum of consideration ought not to be considered. In that case, which came on appeal before Turner and Knight Bruce, L.JJ., the question at issue was whether a settlement was fraudulent and void as against a subsequent bonâ fide purchaser of the settled estate under the statute 27 Eliz. c. 4. In delivering

(1) Law Rep. 1 Ch. 446.

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his judgment Turner, L.J., said (1): "The question, as I apprehend, in cases of this description is, whether there was consideration for the settlement. The Court not entering into the quantum of consideration, in effect the question is, *whether the transaction was one of bargain or of gift merely.*" He then proceeded to state that in his opinion there was consideration for the settlement then under discussion, and that the case was one of bargain and not of gift merely, pointing out a real consideration appearing on the face of the settlement, and a further consideration in fact, though not so appearing. By that decision of course we should be cheerfully bound in any similar case arising upon the statute of Elizabeth. But it establishes no more than this, that in the case before them the Lords Justices thought the consideration, being bonâ fide, a good one to support the conveyance then impeached, that is, a good one to support a contract; it decided no more than this, that the conveyance in question came within the proviso contained in the 4th section of the statute of 27 Eliz. c. 4, as being made upon good consideration and bonâ fide, and so not fraudulent and void under the 2nd section of the same Act.

The case we have just discussed was decided in the year 1866. That of *Bayspoole* v. *Collins* (2), decided five years later, in 1871, cited by Mr. Danckwerts, is an authority to the same effect, but it does not further advance the suppliants' case. The observations of Lord Hatherley, L.C., tend to shew that special reasons had prompted the Court to hold that a very small and inadequate consideration was sufficient to support a settlement under the statute of Elizabeth, reasons which have no existence in such a case as the present, and which therefore fortify us in thinking that the question, what is a voluntary settlement under the Customs and Inland Revenue Act, 1881, is not to be determined simply by a consideration of what would be held to be a bonâ fide conveyance on good consideration under the 4th section of the statute of Elizabeth. *Price* v. *Jenkins* (3) (1877) was also a case under the statute of Elizabeth, which throws no further light on the subject. We have already stated that, in order to

(1) Law Rep. 1 Ch. at p. 458. (2) Law Rep. 6 Ch. 228.
(3) 5 Ch. D. 619.

arrive at a satisfactory conclusion whether the deed of settlement was voluntary or not, the whole circumstances of the case must be carefully considered, and that the fact that in paragraph 5 of the case it is stated that "a new and final bargain was concluded to the effect appearing from the indentures," does not in the least degree influence us; whether there was a bargain or not does not depend upon the language the parties have thought fit to use in stating their case, but upon the facts disclosed; nor are we precluded from looking at the substance of the transaction by the statement in paragraph 8 that the transactions were real transactions, such as they purport to be, for the case of the Crown does not rest upon a charge of fraud; the Attorney General simply contends that, taken as real bonâ fide transactions, they point to the irresistible conclusion that the arrangement was one which obviously had for its object the avoidance of stamp or succession duties on the death of Robert Crossman, whenever that event might happen, an object legitimate enough in itself, and that there was no real consideration for the transfers to the suppliants, or at all events that such consideration as is stated points to the fact that the settlement was purely voluntary on the part of Robert Crossman.

In the event which has happened, namely, the death of Robert Crossman within a week of the execution of the indentures, and long before the 1st of October, 1883, the suppliants have never paid, or become liable to pay, anything for the interests conveyed to them by those indentures; and this state of things was evidently contemplated by the deed, for the interests in the shares were appointed to the suppliants as from the 1st of October, 1883, *or as from the death of Robert Crossman, which should first happen,* whereas the interest of 4*l.* per cent. on the estimated value of them, stipulated to be paid to Robert Crossman during his life, was not to begin to run until the 1st of October, and was to terminate with his life. But his life closed in July, and the suppliants then took the shares absolutely without any payment at all, subject no doubt to the payment of the annuities to the widow and other son *out of the profits;* that liability, therefore, does not affect the question. It is said, however, that the absolute covenant to pay to Robert Crossman, during his life, 4 per

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cent. interest on the value of the shares, regardless of whether the profits of such shares amounted to that sum or not, was in itself a sufficient consideration. We do not so regard it. We look upon that covenant, in substance, though possibly not in form, as a mere mode of reserving to Robert Crossman a life interest in the shares transferred to the extent of 4*l.* per cent. on their value, a sum in all probability far less than the actual annual net profit they were yielding. In substance it was a gift of whatever annual profit (if any), beyond the 4*l.* per cent., the shares might yield during his life, and an absolute gift of them on his death, subject only to the said annuities.

It is further to be observed that by the terms of the deed of transfer no obligation was cast upon the suppliants to execute the covenant to pay the annual interest to Robert Crossman until the 1st of October, and if they had availed themselves of the time thus allowed there would have been no necessity to execute that covenant at all, Robert Crossman having died in the meantime. The substance of the arrangement when the settlement was executed amounted therefore simply to this, viz., that the suppliants were to take the shares as from Robert Crossman's death, if he should die (as in fact he did), before the 1st of October, without any payment, or even covenant for payment, or any other consideration.

We hold then, under all the circumstances, that the transfer was a voluntary settlement within the meaning of s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, and further, that by it an interest for life in the property transferred was reserved, either expressly or by implication, to the settlor.

The case of *Rosher* v. *Williams* (1), decided by Malins, V.C., in 1875, though it affords an illustration of what will not suffice to bring a case within s. 4 of the statute of Elizabeth, and is expressive of the Vice-Chancellor's views and approval of *Townend* v. *Toker* (2), does not assist us to any conclusion. The case of *The Lord Advocate* v. *McKersies* (3), however, is a very strong authority in support of the view we have taken. That was an action to recover succession duty under s. 7 of the Succession Duty Act,

(1) Law Rep. 20 Eq. 210. (2) Law Rep. 1 Ch. 446.
(3) 19 Scottish Law Reporter, 438.

1853. The defenders, John McKersie and William McKersie, were the sons of William McKersie, who for many years was a distiller at Campbeltown in Argyleshire, and who died on the 2nd of December, 1878. Up to the 11th of January, 1876, he was the sole proprietor of the distillery, but on that day he and the defenders entered into an agreement, in which it was declared that from that date he made over and assigned to the defenders his whole interest therein; that the value of his interest on the 2nd of October, 1875, amounted to 28,750*l.*, which on that day he made over to the defenders as a payment on account of the share of the residue of his estate provided to them in his settlement; and that the defenders bound themselves to pay their father an annuity of 1150*l.* (which was 4 per cent. on 28,750*l.*) half-yearly, commencing on the 2nd of April, 1876. That annuity they duly paid up to the time of their father's death. The Crown then claimed succession duty in respect of the beneficial interest accruing to the defenders by the determination of the annuity. The defenders resisted that claim on the ground that the agreement was a bonâ fide sale, and did not confer an interest expectant on death on the defenders. Lord Fraser, Lord Ordinary, before whom the case was heard, gave judgment for the Crown, on the ground that the transaction was not a bonâ fide sale; and he thus described the view he took of the matter:—"Now, was this a bonâ fide sale? Or was it, as the Lord Ordinary holds it to have been, simply a gratuitous transference by the father to his two sons, reserving to himself the interest of the value of the property which he conveyed? No doubt the transference was irrevocable. But still the transaction was one whereby the transferer reserved to himself, not in express words, the life rent of the estate, but he did so in effect. Dealing with this 7th section" (i.e., of the Succession Duty Act) "the Master of the Rolls in the case of *Fryer* v. *Morland* (1) says of it, 'the object is plain enough; it was to prevent a man conveying the fee, reserving to himself a life interest.'—Now this is as effectually done, in the mode astutely adopted in the present case, by taking a bond from the transferees for the interest at the rate of 4 per cent. on the money value of the property conveyed. The defenders paid down

(1) 3 Ch. D. at p. 687.

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nothing in the shape of money or money's worth, and therefore there is absent in this case the first characteristic of a sale, viz., a price paid out of the pockets of the purchasers. The agreement does not deal with the case as one of sale at all. The property is handed over to the defenders, not as purchasers for valuable consideration given by them, but as in anticipation of the share of residue of their father's estate bequeathed to them by his will. They were in the meantime to obtain the use of the money and property conveyed, the father reserving to himself 'a benefit' from the fund, on the ceasing of which the defenders obtained a succession within the meaning of the Act, by an 'increase of beneficial interest,' on which they must pay duty."

In every word of this judgment we entirely concur, and we are unable to distinguish it from the case before us. We come, therefore, to the conclusion that the Crown is entitled to the stamp duty as claimed, and this being so it is unnecessary to say more, with respect to the question as to succession duty, than this, that, had we not been satisfied that the stamp duty was payable, we should have held the suppliants liable for succession duty.

Our judgment will be for the Crown, with costs.

Judgment for the Crown.

Solicitors for the suppliants: *Crossman, Crossman & Prichard.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

P. B. H.

THE QUEEN ON THE PROSECUTION OF BARLOW *v.* COOBAN. 1886 Dec. 20.

Local Government Acts—Local Board—Election—Disqualification of Candidate—Composition with Creditors—Time for filling casual vacancy—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *Sched. II., rr.* 5, 65.

A candidate for election as member of a local board of health had assigned all his property by deed to a trustee for the benefit of those of his creditors who should sign the deed, no sum being mentioned in it as a composition to be paid on the debts therein scheduled as due to them, and the creditors signing the deed thereby discharged him from all debts due to them by him :—

Held, that he was not disqualified under 38 & 39 Vict. c. 55, Sched. II., r. 5, which provides that a person "who has entered into any composition with his creditors," shall be ineligible "so long as any proceedings in relation to such composition are pending," even though at the time of his election some of his creditors had signed the deed, while others did not sign it till after the election, for that the deed was not "a composition with creditors." The time specified by r. 65 of the same schedule which provides that any casual vacancy on the board occurring "by failure duly to elect," shall be filled up by the board within six weeks, is to be computed from the day on which the retiring member goes out of office, and not from the day on which the election of a member to fill his place is held.

RULE nisi for an information in the nature of a quo warranto, calling on the defendant to shew by what authority he claimed to exercise the office of a member of the Local Board of Health for Walton-on-the-Hill.

It appeared that an election was held on the 10th of April, 1886, for the purpose of electing a member to fill the place of the retiring member for the St. Mary Ward of the Walton-on-the-Hill Local Board of Health, whose period of office expired on the 15th of April. There were three candidates, Barlow, the relator, who received 162 votes; Cooban, who received 129; and Marr, who received 114 votes. An objection was lodged with the returning officer against Barlow, on the ground that he had entered into a composition with his creditors, that proceedings were pending in relation to that composition, and that he was therefore ineligible under 38 & 39 Vict. c. 55, Sched II., r. 5.

The returning officer held that Barlow was disqualified, and as no one had obtained an absolute majority of votes, the local board considering that there was a casual vacancy within rule 65 of the same schedule, appointed the defendant to fill the vacancy.

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The date of the appointment was within six weeks from the 15th of April, but more than six weeks from the 10th of April. With respect to the disqualification it appeared that Barlow in 1885 executed a deed by which he assigned to a trustee for the benefit of all creditors who should sign the deed, all his property of every kind, in order that the trustee might pay the creditors who should come in under the deed rateably, as if Barlow had been duly adjudged bankrupt, and the creditors in consideration thereof did by signing the deed release him from his debts due to them. No sum was named in the deed by way of composition to be paid on the debts, the amounts of which were stated in a schedule. Some of the creditors had executed the deed prior to the 10th of April, 1886, and the remainder had executed it since that date.

J. Walton, shewed cause. The defendant is rightly in office as a member of this local board, for the relator being disqualified there was a casual vacancy by failure duly to elect within the meaning of 38 & 39 Vict. c. 55, Sched. II., r. 65 (1), and it has been filled up within six weeks from the date of the vacancy, that is the 15th of April, on which day by rule 59 the retiring member went out of office. The relator was disqualified under rule 5 (1), because he had in 1885 entered into a composition

(1) The following rules were referred to:—

38 & 39 Vict. c. 55, Sched II.: "Rules for Election of Local Boards."

5. "A person who is a bankrupt or whose affairs are under liquidation by arrangement, or who has entered into any composition with his creditors, shall be incapable, so long as any proceedings in relation to such bankruptcy, liquidation, or composition are pending, of being elected member of a local board."

59. "Subject as hereinafter mentioned one third of the number of members elected for the district, or if the district is divided into wards, one third of the number elected for each ward (being those who have been longest in office) shall go out of office on the 15th of April in each year."

62. "Before the 15th of April in each year a number of persons equal to the number of retiring members shall be elected in manner provided by this schedule, and so many others as may be necessary to complete the full number of the local board in respect of which the election is held."

65. "Any casual vacancy occurring by death, resignation, disqualification, failure duly to elect members or otherwise in a local board, shall be filled up by the local board out of qualified persons within six weeks, or within such further period as the Local Government Board may by order allow, but the member so chosen

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with his creditors, and as all the creditors had not signed the deed by the 10th of April, 1886, proceedings in relation to that composition were still pending. The provisions of rule 5 are not limited to composition deeds made pursuant to 32 & 33 Vict. c. 71, the Bankruptcy Act in force when 38 & 39 Vict. c. 55, was passed. Any arrangement between a debtor and his creditors whereby the creditors consent to accept something less than full payment in cash of their debts is a composition. The words of rule 5 are more general than those of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76, s. 52), where the words used were "shall compound by deed," and that provision was extended by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 21, as was decided in *Aslatt* v. *Corporation of Southampton* (1), so that an arrangement such as this whereby the creditors take an estate of uncertain value, and give the debtor his discharge falls within the words "any composition with his creditors" which are found in rule 5.

The Court has, moreover, a discretion, and it will not order a quo warranto to issue when there has been delay and when the relator could have raised the question at once by petition, for 47 & 48 Vict. c. 70, s. 36, applies to local board elections the provisions of part iv. of 45 & 46 Vict. c. 50.

C. Dodd, in support of the rule. The relator was not disqualified, he has not entered into any composition with his creditors, if he has still there was no composition within the meaning of 32 & 33 Vict. c. 71, to which r. 5 alone applies, and even if there has been such a composition, still no proceedings were at this time pending in relation to it: *Aslatt* v. *Corporation of Southampton* (1) supports this contention, for it shews that the Municipal Corporations Act, 1835, s. 52, then in force, must be construed strictly, and although s. 21, now repealed, of the Debtors Act, 1869, extended the provisions of that Act, still it limited the disqualification to cases of composition under the Bankruptcy Act, 1869.

The defendant can in no case claim to fill the office, for he was

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shall retain his office so long only as that vacating member would have retained the same if no vacancy had occurred."

(1) 16 Ch. D. 143.

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not duly appointed, having been appointed after the six weeks specified in r. 65 had elapsed, for the time must be computed from the 10th of April, when there was a failure duly to elect, inasmuch as that failure caused the casual vacancy mentioned in r. 65.

There has been no delay. A petition could not be presented under 45 & 46 Vict. c. 50, s. 87, for it is not alleged that the defendant was disqualified or that the election was vitiated by corrupt practices. The office was full, a mandamus would not be granted, and quo warranto is the appropriate remedy.

DENMAN, J. I do not think that it is possible to have a confident opinion on all the questions raised in this case; but I am of opinion that the relator was not disqualified from being elected as a member of this local board. An election was held on the 10th of April for the Local Board of Health to choose members to fill the places of those who were to vacate their seats on the following 15th of April. There were three candidates for one vacancy, and on the votes being counted on the 10th of April it was found that Barlow had received 162 votes, that the defendant had received 129, and that Marr had received 114. In such an election as this the returning officer is not merely a ministerial officer, as he has recently been held to be in municipal elections, for Sched. II. of 38 & 39 Vict. c. 55 contains express provisions as to the duty of a returning officer in the case of an election to a local board. An objection was made to the election of the relator on the ground that he was disqualified under r. 5 of this schedule as having entered into a composition with his creditors, and there is no doubt that he had entered into a deed assigning all his property to a trustee for the benefit of his creditors, that is, of those who should become parties to it, and that on the 10th of April several of his creditors had signed the deed, though some had not, and did not do so until after the 15th of April, when the vacancy was established, to fill which the election was held on the 10th of April, so that the arrangement under that deed was not at that date a completed transaction. After this objection was taken some delay occurred, and at length the local board appointed the defendant as a member of the board pursuant

to r. 65 of Sched. II. of 38 & 39 Vict. c. 55, and this they did on the last day of the six weeks named in that rule, assuming the period of six weeks to run from the 15th of April and not from the 10th of April. It is necessary, therefore, to consider the words of r. 65, which provides that "any casual vacancy occurring by death, resignation, disqualification, failure duly to elect members or otherwise in a local board shall be filled up by the local board out of qualified persons within six weeks." When then did this vacancy occur? It is clear on referring to r. 59, which provides that members "shall go out of office on the fifteenth of April," and to r. 62, which provides that "before the fifteenth of April in each year a number of persons equal to the number of retiring members shall be elected," that the vacancies do not occur until the 15th of April. The vacancy, therefore, in this case occurred on the 15th of April, and that casual vacancy caused by the alleged failure duly to elect on the 10th of April was filled up by co-optation, if that be the proper term, within six weeks from the 15th of April, so that the defendant was properly co-opted as far as the limit of time is concerned.

Was the relator, however, incapable of being elected by reason of any disqualification under r. 5 of the schedule? He had not been adjudicated a bankrupt, his affairs had not been the subject of a liquidation by arrangement under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which was in force when 38 & 39 Vict. c. 55, was passed. I doubt whether he had entered into any composition with his creditors within r. 5, for I incline to think that the provisions of r. 5 of this schedule are limited to the proceedings provided for and contemplated by the Bankruptcy Act, 1869. It is, however, unnecessary to decide this, for I fail to see that what Barlow did was to enter into a composition at all. It may be that such a case as this is a casus omissus from 38 & 39 Vict. c. 55, altogether; but whether that be so or not, I am of opinion that he did not enter into a composition with his creditors. He made a cessio bonorum in their favour, he assigned all his property for their benefit, he made no bargain with them, and there was no composition with his creditors with regard to which any proceedings were at the time of his election pending within the meaning of r. 5 of Sched. II. of 38 & 39 Vict. c. 55.

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I do not say that it is necessary to confine the word "proceedings" in that rule to legal proceedings, though that is the interpretation which one would naturally give to that word so placed in a schedule to a statute; but however that may be I do not think that this case is within it. This deed not falling within r. 5, the relator was not disqualified, and as what the local board has done is to assert by its action that a disqualification existed which did not exist, and as it has thereupon co-opted the defendant, we ought to make the rule for a quo warranto absolute as against him, because he has been unduly placed in office as a member of this local board.

HAWKINS, J. I assent to the judgment of Denman, J., and, except as to the question whether this deed was a composition deed within the meaning of r. 5 of Sched. II. to the Public Health Act, 1875 (38 & 39 Vict. c. 55), I do not desire to add anything. I think that it is somewhat difficult to determine whether a composition deed not made in pursuance of any statute would be a disqualification within the meaning of r. 5, so long as the deed was not actually completed. It is clear that in 1875 composition deeds could be made either pursuant to or outside the provisions of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and there is nothing in r. 5 of the schedule to the Public Health Act, 1875 (38 & 39 Vict. c. 55), which shews that it includes a private composition deed, or that the existence of such a deed would disqualify the party to it within the meaning of that rule, even if some matters in relation to it were still pending. Rule 5 in Sched. II. of the Public Health Act, 1875 (38 & 39 Vict. c. 55), seems by its very terms to have reference to the provisions of the Bankruptcy Act, 1869, the Act which was then in force, for it speaks of the three classes of persons with whom that Act deals, that is, bankrupts, persons who liquidate their affairs by arrangement, and those who enter into compositions with their creditors. It contains the words "who has entered into any composition with his creditors," while r. 64, which deals with the disqualification of members after election, does not contain that phrase, but one slightly different, for it speaks of a man who "compounds with his creditors." The former expression is that found in the

Bankruptcy Act, 1869, where Part VII. is entitled "Composition with Creditors." These considerations seem to me to support the view that r. 5 does not apply to private arrangements by way of composition.

Turning now to the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 14, which speaks of "composition with creditors in pursuance of the Bankruptcy Act, 1869," this section recognises that there may be two kinds of composition, and it seems to me to recognise a distinction between a composition under the Bankruptcy Act, and one which not being under that Act has been called a private composition, and it may be that the disqualification in r. 64 would apply to both kinds of composition deeds; but it is not necessary to decide this, for however that may be, I am of opinion that this deed is not a deed of composition by the relator with his creditors. A composition is an arrangement by which the debtor gives and the creditors accept something which falls short of payment in full in satisfaction of the whole of the debts due by the debtor.

Looking, however, at this deed, I do not find anything to shew that the property which the debtor has assigned will not produce 20*s.* in the pound for his creditors. It contains no provision by which any one creditor can be compelled to take less than 20*s.* in the pound if he can get it, for all the property is to be divided, and there is no obligation on any creditor to take less than the full amount of his debt. The deed, therefore, does not bind the creditors to take less than the full amount of their debts, and it cannot properly be called an arrangement for a composition, it is in fact an assignment of all his property by the debtor for the benefit of his creditors, who, however, are not asked to make any sacrifice; but who are authorized to divide all the debtor's property amongst themselves. The relator, therefore, is not disqualified, and the rule must be made absolute.

Rule absolute.

Solicitors for relator: *Bower, Cotton, & Bower, for Pride & Dodgson, Liverpool.*

Solicitors for defendant: *Sharpe, Parkers, Pritchard, & Sharpe, for Cleaver & Holden, Liverpool.*

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Dec. 13.

PARTRIDGE *v.* MALLANDAINE.

Revenue—Income Tax—Betting—"Vocation"—5 & 6 Vict. c. 35, Sched. D.

Persons receiving profits from betting systematically carried on by them throughout the year, are chargeable with income tax on such profits in respect of a "vocation" under 5 & 6 Vict. c. 35 (the Income Tax Act) Sched. D.

CASE stated under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the Income Tax Commissioners at Wolverhampton the appellants appealed against an assessment made upon them for the township of Wolverhampton in the sum of 1000*l.* under Sched. D. in respect of their profits as commission agents.

The appellants stated that they had no profession or employment, but that they attended race-courses as bookmakers or bettors on horse-racing, and had done so for some years, but that they did not take commissions for betting. The question of the amount of assessment was not raised, and the appellants were not prepared with any accounts of their profits, as they only kept one betting-book, which was destroyed at the end of each year, and they contended that they had no trade, profession, calling, or vocation within the meaning of the several Acts relating to income tax, and that the profits made by them from attending race-courses and betting, as aforesaid, were not legal profits or gains, and were not assessable to the income tax, and that they could not legally recover any amounts due to them in respect of bets.

The surveyor (the respondent) contended that betting systematically and annually carried on came within the provisions of the Income Tax Act as a vocation, and that the profits or gains thereof were chargeable, and referred to the 5 & 6 Vict. c. 35, s. 100, Sched. D., and also to the first rule of the same section, and that as regards the definition "commission," if any error of description or otherwise occurred in the assessment, the Commissioners had power to amend the same.

The Commissioners being of opinion that the intention of the legislature was that all profits or gains of every description

derived from professions, trades, vocations or employments should be assessed to the income tax, and that the appellants were liable either under the 5 & 6 Vict. c. 35, s. 100, second case, first rule, or as on undescribed profits under the sixth case of the same section, confirmed the assessment.

W. Graham, for the appellants. The assessment is on profits made by the appellants "as commission agents." But it is found as a fact that they are not commission agents. They merely bet, and have no "profession, employment, or vocation," within 5 & 6 Vict. c. 35, s. 100, Sched. D.; nor within 16 & 17 Vict. c. 34, s. 1, Sched. D. Betting is certainly not a profession. The professions are certain, recognised, and well known, and betting is none of them. Nor is it an "employment" within the meaning of the Act. The word as there used does not include every pursuit or amusement with which a person may occupy himself, but means the employment of one man by another, an employment analogous to a profession. Nor is betting a "vocation" or calling. It is only an amusement. Bets are void and not recoverable in law. The legislature did not intend that all money received should be assessed to income tax. Gifts of money, and money won in gambling and betting are not "profits" within the Act.

Sir R. G. Webster, *A.G.*, *Sir E. Clarke*, *S.G.*, and *Dicey*, for the respondent, were not called upon to argue.

DENMAN, J. The case states the contention of the surveyor that betting systematically and annually carried on came within the provisions of the Income Tax Act as a vocation. Seeing that the case states enough for us to find here that the appellants are persons who in partnership attend races and systematically and annually carry on that pursuit so as to make profits,—for we must, I think, assume that profits were made—the question is whether the Commissioners were right in holding that those profits were derived from a "vocation" within Schedule D? I think the Commissioners were quite right. The words in 5 & 6 Vict. c. 35, s. 100, Sched. D, second case, are "professions, employments, or vocations." I am not disposed to put so limited

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a construction on the word "employment" as that suggested in argument. I do not think that employment means only where one man is set to work by others to earn money; a man may employ himself so as to earn profits in many ways. But the word "vocation" is analogous to "calling," a word of wide signification, meaning the way in which a man passes his life. The appellants attend races, make bets, and earn profits. Is it to be said that, under these circumstances, they are not to be assessed to the income tax, although every year they may have bets paid which put a thousand pounds into their pockets? Can it be said that because bets are made null and void by Act of Parliament the appellants do not carry on a "vocation"? To put such a construction on the Income Tax Act would unduly favour persons not favoured by the legislature. I think the word "vocation" is not limited to a lawful vocation, and that even the fact of a vocation being unlawful could not be set up against the demand for income tax. I think that the case comes within the word "vocation," and therefore the Commissioners were right.

HAWKINS, J. "Vocation" and "calling" are synonymous terms, and if any one were asked what was the calling of the appellants, the answer would be that they were professional bookmakers. What that means is well known, and is fully described in the case. Mere betting is not illegal. It is perfectly lawful for a man to bet if he likes. He may, however, have a difficulty in getting the amount of the bets from dishonest persons who make bets and will not pay. The appellants, in fact, make considerable profits, and I cannot see why they should not be taxed as those made in any other profession or calling.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Parkers, & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

J. R.

CONSERVATORS OF THE RIVER THAMES *v.* COMMISSIONERS OF INLAND REVENUE. 1886 *Dec.* 13.

*Revenue—Stamp—Revocable Agreement to grant Permission for erection of Jetty—Duty on—*33 & 34 *Vict. c.* 97 (*Stamp Act*, 1870), *ss.* 70, 78, *and Sched.*

By an instrument not under seal the Conservators of the Thames agreed to grant permission during their pleasure to the appellants to construct and retain a jetty in consideration of an annual payment yearly so long as the jetty was allowed by the Conservators to remain:—

Held, that the instrument was not chargeable with stamp duty under 33 & 34 Vict. c. 97 (the Stamp Act, 1870), either as a "conveyance on sale" within s. 70, or as an instrument whereby any property was transferred to or vested in any person, within s. 78, or as a "lease or tack," or "bond, covenant, or instrument of any kind whatsoever," within the schedule, but only as an "agreement."

CASE stated by the Commissioners of Inland Revenue under s. 19 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), on the application of the Conservators of the River Thames.

The following was a copy of the instrument in question:—

"The Conservators of the River Thames, by their secretary, Edward Burstal, hereby agree to grant permission, during the pleasure of the Conservators, to the Stone Court Chalk Land and Pier Company, Limited, of 60, St. Paul's Churchyard, in the city of London, on their application, to construct a new jetty on the western side of the existing jetty at their premises, Stone Court, Northfleet, with an extension to unite the two jetties, and to retain the existing jetty, barge-beds and moorings, and to place a dolphin on each side of the jetty, as shewn on the plan numbered 3863, signed and deposited with the Conservators by the said Stone Court Chalk and Land and Pier Company, in consideration of the annual payment of the sum of seventy-seven pounds, and the said Stone Court Chalk Land and Pier Company hereby agree to accept such permissive grant on the terms and conditions thereof, and to pay to the said Conservators, at their office, for such grant, the said sum of seventy-seven pounds yearly, and every year so long as the aforesaid jetty and accommodations are allowed by the said Conservators to remain, the first payment of the said annual sum of seventy-seven pounds to

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be due and made on the 29th day of September, 1886. And the said Stone Court Chalk Land and Pier Company further agree to remove such jetty and other accommodations on receiving notice in writing from the Conservators requiring them so to do, and, in default, that the said Conservators may be at liberty, by their officers, servants, or workmen, to remove such jetty and other accommodations, and to recover the cost and expenses thereof from the said Stone Court Chalk Land and Pier Company as liquidated damages.

"Dated this 4th day of February, 1886.

"As witness the signature of the said parties,

"The Stone Court Chalk Land and

"Pier Company, Limited.

"E. Burstal. "W. R. Farlow,

"Witness, W. H. Hoard, "Secretary.

"Receiver."

The Commissioners were, on the 12th day of February, 1886, required by the Conservators, pursuant to s. 18 of the Stamp Act, 1870, to express their opinion with reference to the said instrument, which was then stamped with the duty of 6*d.*, as to the amount of stamp duty with which, in their judgment, it was chargeable.

The Commissioners being of opinion that the instrument was chargeable as an instrument of conveyance on sale, with the ad valorem duty of 7*l.* 15*s.* in respect of the sum of 77*l.*, payable yearly for an indefinite period, assessed the duty thereon accordingly. The instrument had been duly stamped in accordance with the said assessment, and also with the particular stamp in use for denoting that an instrument is duly stamped.

The question was, with what stamp duty the above-mentioned instrument was chargeable.

Bankes, (*Crump*, *Q.C.*, with him), for the appellants, referred to 33 & 34 Vict. c. 97.

The Court called on

Dicey (*Sir R. E. Webster*, *A.G.*, and *Sir E. Clarke*, *S.G.*, with him), for the respondents. The document in question, whether

it is a permissive grant or licence, or whatever else, confers a valuable right of occupation. Such valuable right is "property." Any right legally transferable for money is "property" within s. 70. For instance, the goodwill of a trade. The assignment of such goodwill is an assignment of property within the Stamp Acts: *Potter* v. *Commissioners of Inland Revenue.* (1) The appellants may rely on the *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (2), where a licence by deed to carry on the business of asphalte paving was held not chargeable with stamp duty as "a conveyance or transfer of property" within the Stamp Act of 1870. If, however, that case could have been disposed of on the ground that the instrument was merely a licence, that ground would have been taken. But it was not. The argument advanced was that no right then known to the law passed by the instrument. But the right given by the document before the Court is a "property" within s. 70. By s. 78 "every instrument . . . . whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property." The words transfer of property are there used in the widest sense. In *Cory* v. *Bristow* (3) the Thames Conservators gave permission to the appellants to lay down moorings in the river, and they moored a hulk there, which the Conservators might remove at a week's notice, yet the House of Lords held that the appellants were in occupation of part of the bed of the river, and were rateable for it. The document is within s. 70, and is assessable on the basis indicated in s. 72, sub-s. 2. It is, at least, chargeable with some duty, and the Court must assess it. It is within the schedule either as, first, a "conveyance or transfer on sale of property" within the terms of s. 70; or, secondly, as a "conveyance or transfer of any kind not hereinbefore described;" or, thirdly, as a "lease or tack;" or, fourthly, as a "bond, covenant, or instrument of any kind whatsoever;" or, fifthly, as an "agreement." It is a "lease or tack . . . . for an indefinite term," or, "of any other kind whatsoever not hereinbefore described." Or, if not a "bond or covenant," it must come within

(1) 10 Ex. 147; 23 L. J. (Ex.) 345. (2) Law Rep. 7 Ex. 211.
(3) 2 App. Cas. 262.

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the following words, "instruments of any kind whatsoever," and is "security for sums of money."

Bankes, for the appellants. The group of sections of which ss. 70 and 72 form part, are placed under the title "conveyances on sale," and are governed by the word "sale." For example, s. 70 defines "conveyances on sale" to include every instrument whereby any property "upon the sale thereof" is transferred. Sale is "a transfer of the absolute or general property in a thing for price in money:" Benjamin on Sale, 2nd ed. p. 1. There is no sale in the present case, and therefore it is not within the above sections. Nor is there any conveyance other than a sale or mortgage within s. 78, for no "property" is transferred to or vested in the appellants. The document is the creation of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), and is for the purpose (1.) of enabling persons to erect on the highway that which would, if unauthorized, be a nuisance; (2.) of providing funds for the Conservancy. It is a "permission" only. The Conservators had no power to transfer or vest any property or to bargain away their dominion for any definite time. A mere personal licence does not create any interest: *Wood* v. *Leadbitter* (1); *Hyde* v. *Graham* (2); *Hill* v. *Tupper*. (3)

Secondly, the document is not a "lease or tack." The Conservators have no power to make any such lease. Where they are authorized to lease, as by s. 60, appropriate words are used. Moreover, by 8 & 9 Vict. c. 106, s. 3, a lease must be by deed.

Thirdly, it is, of course, not a bond or covenant, nor is it an instrument of that kind to secure money. It does not require any stamp: *Chanter* v. *Johnson*. (4)

Sir E. Clarke, S.G., replied.

DENMAN, J. This case has been argued under considerable disadvantages, arising from the practice of submitting to the Court several questions without specifying what the real questions for the Court are. That arises, no doubt, from the loose language of the Act under which the case is stated, and which enables the Commissioners to impose on the Court the general

(1) 13 M. & W. 838.
(2) 1 H. & C. 593.
(3) 2 H. & C. 121.
(4) 14 M. & W. 408.

obligation of saying what stamp duty is chargeable. The Attorney General has, however, undertaken that in future the points of contention shall be shewn either in or with the case stated. In the present case the Commissioners have held that a particular document is chargeable as an "instrument of conveyance on sale." Whether it is so or not is the first and most important question, and the one which the counsel for the Inland Revenue most strongly pressed. [The learned judge read the document.] That first question depends on the proper construction of 33 & 34 Vict. c. 97, s. 70. "The term 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction." I entertain a very clear opinion that the document does not come within that definition. In the first place, I do not think that this licence to erect a jetty, &c., confers what can properly and legally be considered a *property* on the company. It confers only a *licence* to do certain things on property vested in the Conservators which they have no right to bargain away, or, indeed, to part with for any longer time than they think sufficient, having regard to their primary duty to keep the river Thames clear from all obstruction, and it is only with respect to their proper watchfulness, looking at the requirements of the river, that they can grant such licences. Still more certainly do I think this is no case of "sale." I can discover nothing in this document which amounts to a sale of anything whatever. It gives simply a right to erect a thing for which, so long as it shall remain, so much money shall be paid. I do not think any property vested in any "purchaser." I see no "transfer" nor "purchasing" of property. Every word of the section seems to bring the case out of and not within the Act. But the document is said to be within terms of the schedule as "a conveyance or transfer . . . . not hereinbefore described." If I am right in holding that it is not within s. 70, neither is it within s. 78, by which "every instrument, and every decree or order of any Court or of any Commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable

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with duty as a conveyance or transfer of property." I cannot perceive that there is any property *passing* under this document, nor any transfer nor vesting of any property in the appellants. So, although the words "on sale" are not in s. 78, there is nothing to negative the application of my remarks on the former clause.

Secondly, it is argued that the document is a "lease or tack." It is certainly not so in ordinary language. But it is said that the words "lease or tack" in the schedule contemplate things not within the ordinary and popular definition of those words, for there are expressions indicating an indefinite term, unlike those of an ordinary lease. But is this in any sense a "lease or tack?" There is here no absolute demise of the property; this document is a licence to do certain things and an undertaking that as long as the things are permitted there shall be a right in the Conservators to receive certain money. The words of the schedule include a lease or tack, (1.) for any definite term less than a year, (2.) for any other definite term or for any indefinite term." Then follows a table of amounts of duty, if the term is definite or is indefinite. All those however depend on whether the document is really a "lease or tack." The argument of the counsel for the appellants has satisfied me that it is not. It is a thing provided for by the Thames Conservancy Act as within the powers of the Conservators. They have certain powers only, and cannot bargain away their rights. Their Act definitely provides for the document in question as a permission to do a certain thing. It has been contended that because *Cory* v. *Bristow* (1) decided there might be rateable occupation by moorings in the Thames, the appellants have an occupation, though merely permissive, making the receipt of money for it a receipt of the money by way of rent, and that therefore the document is a lease. That seems a strained construction of the Act. There is no indication in it of any intention to include so very peculiar a document as this. I do not say that it would not be reasonable to include it, but I think the legislature has not thought of it, nor intended to include it. Then, if not a lease or tack, it is said to come within the very wide terms of the schedule following "Bond, Covenant," viz., "Instrument of any kind whatsoever,"

(1) 2 App. Cas. 262.

and be chargeable with a tax which would in this case amount to 1*l*. That appears to me the strongest contention put before us, and I do not say that I should be greatly surprised if some other tribunal took a different view to mine. But I think the contention for the appellants is well founded, that in reading a schedule such as this, giving a charge on a certain set of instruments, the words ought to be considered—not each word separately and alone—but with reference to one another, and where there are the words "Bond, Covenant" coupled with the words "being security for . . . sums of money," that at once directs the mind and makes it probable that the intention of the legislature was not to include anything not of the same kind as a bond or covenant for payment of money. I do not forget the argument of the Solicitor General to the contrary, that, as this part of the schedule is not to apply to a security for interest already secured, "nor rent reserved by a lease or tack," even a "lease or tack" would come within the clause but for the exception. But on the whole I think those words are contemplating different things and not such a document as this, which is a mere licence to do a thing and for the payment of money so long as it continues at the pleasure of the grantor and not one moment longer. Then the only remaining question is whether this document is liable to be stamped as an "agreement." It has been so stamped, and if necessary I should say that in my opinion there is not the least doubt that it is liable to be stamped and has been properly stamped as an agreement.

HAWKINS, J. I am of the same opinion. Whether the document is a "conveyance on sale" depends on the terms of s. 72. [The learned judge read it.] Then s. 78 does not carry the matter further. The question is whether by this document any property is transferred or conveyed as by sale. When I read the document it does not appear to be a conveyance on sale nor a transfer. In the first place, I think it doubtful whether this was more than an agreement to grant permission to construct a new jetty, and whether another instrument would not be required before that grant would have effect. Most unquestionably the document does not purport nor seem to be intended to

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pass any "property" as on sale. It is merely to grant permission, not to pass property. I cannot understand how it can be said that property is transferred when no property is passed, and the document confers no right to dispose of or transfer it in any way. How can that be said to be property which never passes from the transferor and which the transferee has no right to dispose of? The alleged transferee has not power to assign even with permission. I am clearly of opinion that, under s. 70, this document is not a "conveyance on sale of any property." As regards the other contentions, I am far from saying that this document was ever intended to be a "bond or covenant," and I doubt whether it is any "security" at all. As regards the words "lease or tack," the document is not one. But I think it is an "agreement," and properly stamped as such. The effect of our judgment will be that the stamp now affixed is unnecessary, and the appellants are entitled to repayment of 7*l.* 14*s.* and costs.

Order accordingly.

Solicitors for appellants: *Elmslie, Forsyth, & Elmslie.*
Solicitors for respondents: *Solicitors for the Inland Revenue.*

J. R.

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Oct. 29, 30; *Nov.* 5, 26.

[IN THE COURT OF APPEAL.]

IN RE GILLESPIE. EX PARTE ROBARTS.

Bill of Exchange—Bill drawn Abroad on Acceptor in England—Bankruptcy of Acceptor—Proof by Drawer for re-exchange—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 57, 97.

Notwithstanding the provisions of s. 57 of the Bills of Exchange Act, 1882, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill.

And, under s. 37 of the Bankruptcy Act, 1883, the drawer, though he has not paid these damages, can prove in the bankruptcy of the acceptor in respect of his contingent liability to pay them.

Decision of Cave, J. (16 Q. B. D. 702) (subject to a reduction in the amount of proof) affirmed.

APPEAL by the trustee under a scheme of arrangement of the affairs of A. M. Gillespie & Co., against an order of Cave, J.,

allowing in part a proof tendered under the scheme by N. F. Robarts.

The facts are stated in the report of the case in the Court below (1), and in the judgment of this Court.

Cohen, Q.C., and *Yate Lee*, for the appellant. (1.) Assuming that the Tobago statute (2) makes the executors liable to pay damages in the nature of re-exchange, s. 57 of the Bills of Exchange, 1882 (3), prevents them from recovering the amount

(1) 16 Q. B. D. 702.

(2) By an Act (23 Vict. c. 3) of the Island of Tobago, entitled "An Act respecting Damages on Bills of Exchange," it is enacted that "On any bill of exchange returned to this island duly protested to the prejudice of any merchant, trader, or other person whomsoever, it shall be lawful to and for any person so prejudiced to demand and receive damages at and after the rate of ten pounds for every hundred pounds, together with interest, and the expense of noting and protesting; and on an action to be commenced under the Act 22 Vict. c. 10, or under the Common Law Procedure Act, the plaintiff shall be at liberty to indorse a claim for such damages on the writ of summons, in addition to the other claims authorized to be indorsed, and such amount indorsed for damages shall be taken as a liquidated debt." . . . .

(3) Sect. 54. "The acceptor of a bill, by accepting it—(1) engages that he will pay it according to the tenor of his acceptance."

Sect. 55. (1) The drawer of a bill by drawing it—

(*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken.

Sect. 57. "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

"(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

"(*a*) The amount of the bill:

"(*b*) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

"(*c*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."

"(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment."

By sect. 97. (1) "The rules in

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of the liability against the acceptor here. Sect. 57 was intended to alter the law as laid down in *Walker* v. *Hamilton* (1), and *In re General South American Co.* (2); and to limit the liability of the acceptor of a bill of exchange to the amount of the bill, with interest and notarial charges. The fact that re-exchange is expressly mentioned in sub-s. 2 of s. 57, with reference to bills dishonoured abroad, shews that it was not intended that any re-exchange should be recovered in the case of bills dishonoured in this country. Sect. 54 defines the liability of the acceptor, and s. 55 that of the drawer. The acceptor only undertakes to pay the specified sum, with interest and expenses; he does not undertake, like the drawer, to indemnify the holder against the consequences of non-payment. Re-exchange arises when the promise is to pay a bill abroad, and the action is brought in England. The 10 per cent. provided by the Tobago statute only fixes the amount of re-exchange. Sect. 57 has restored the law which was supposed to exist before the decisions in *Walker* v. *Hamilton* (1); Byles on Bills (14th ed.), p. 449; *Napier* v. *Schneider* (3); *Woolsey* v. *D. Crawford.* (4)

Secondly, the executors are not the holders of the bills, and no one can prove for re-exchange, or anything analogous to it, unless he is the holder of the bill, and has been compelled to pay it. Even if such a person had been repaid the amount of the bill, he would still have to sue on the bill for the damages for re-exchange. In all the reported cases, the person who recovered re-exchange against the acceptor had paid the bill: *Francis* v. *Rucker.* (5)

Thirdly. The Tobago statute applies only to subjects of Tobago. At any rate, it only applies when the bill is returned to some one in Tobago, and he is suing on it in Tobago. In this case the bills have not been returned to Tobago, and, if they ever are, that will not be "to the prejudice of" Mrs. Horsford, but to her

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bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques."

(1) 1 D. F. & J. 602.

(2) 7 Ch. D. 637.

(3) 12 East, 420.

(4) 2 Camp. 445.

(5) Amb. 671.

advantage. It will be "to the prejudice of" the executors. She, having paid the bills, would be a gainer by suing the executors on them in Tobago.

Fourthly. The damages which could now be recovered against the executors under the Tobago statute would not amount to 300*l.*; they could not exceed 80*l.*, which would be 10 per cent. on the balance of 800*l.* now remaining due to Mrs. Horsford.

A. Charles, Q.C., and *Herbert Reed*, for the executors. The nature of the liability in respect of which the executors claim to prove is the same as that which was admitted to proof in *Francis* v. *Rucker* (1), unless there is any distinction between actual payment by the drawer and liability on his part to pay. That case and *Walker* v. *Hamilton* (2) govern the present case, unless any alteration in the law has been made by the Bills of Exchange Act, 1882. The liability of the acceptor of a bill of exchange is not altered by that Act, which only codified the law, and s. 97 preserves the old rules of law, unless they are inconsistent with the express provisions of the Act. Sub-s. 2 of s. 57 is not exhaustive, for, if it were, the holder of a bill of exchange dishonoured abroad could recover from the acceptor only the re-exchange—not the amount of the bill. Cave, J., was right in holding that s. 57 applies only to liquidated damages, not to any other.

It is immaterial that the executors have not actually paid the 10 per cent.; they have admitted their liability to pay it. But it is clear that if Mrs. Horsford were to sue them on the bills in Tobago, she would recover the 10 per cent. in addition to what remains unpaid on the bills. The judgment would be for the whole amount of the bills, plus interest and the 10 per cent., less what the defendants could shew that they had paid. This liability can be proved in the bankruptcy of the acceptor. In *De Tastet* v. *Baring* (3), the direction given by Lord Ellenborough to the jury (4) shews that legal liability to pay re-exchange is sufficient, without actual payment, and see *Randall* v. *Raper*. (5)

The Tobago statute lays down an absolute rule for payment of

(1) Amb. 671.
(2) 1 D. F. & J. 602.
(3) 11 East, 265.
(4) Page 266.
(5) E. B. & E. 84.

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the 10 per cent. if the bill is dishonoured; the acceptors did not pay the bills, and they cannot now take advantage of the subsequent payments made by the drawers in order to reduce the damages to 10 per cent. on the balance now remaining unpaid. Nothing has been paid of which the drawers could take advantage as against the holder.

Cohen, Q.C., in reply. It is only the person who has paid the bill and is the holder of it who can recover damages for re-exchange. In *Francis* v. *Rucker* (1) the bill had been paid, and also the re-exchange. The holder of the bills, having paid them in Tobago, could recover the re-exchange. The Tobago statute gives the 10 per cent. in lieu of re-exchange, and it applies only to an action brought in Tobago.

As to the Bills of Exchange Act, if the argument of the respondents is well founded, sub-s. 2 of s. 57 was unnecessary; for unliquidated damages could have been recovered without it. But s. 57 was intended to be an exhaustive definition of the measure of damages.

Cur. adv. vult.

1886. Nov. 26. The judgment of the Court (Lord Esher, M.R., Lindley, L.J., and Lopes, L.J.) was delivered as follows by

LINDLEY, L.J. This was an appeal by the trustee of the bankrupts against the allowance of a proof for 300*l.* as a debt against the bankrupts' estate. The proof was made by Mr. Robarts, as the agent under a power of attorney of the executors of a lady named Keens, who lived in the island of Tobago. By her will she bequeathed a legacy of 3000*l.* to a lady named Horsford, living in the island of Trinidad. In order to pay this legacy the executors drew bills of exchange for 3000*l.* on the bankrupts, who had 9000*l.*, or thereabouts, money of the deceased in their hands. The executors sent the bills so drawn to Mrs. Horsford; she sold and indorsed them to persons of the name of Turnbull. They presented them to the bankrupts, who accepted them, and dishonoured them when due. Thereupon the holders required Mrs. Horsford to pay them, which she did. She, in her turn, required the drawers to pay her, and they, in fact, have paid her 2200*l.* on account of the bills, leaving a balance of 800*l.* still due

(1) Amb. 671.

to her, besides interest and expenses. At the time of the proof Mrs. Horsford was, and she still is, the holder of the bills, and she had then, and has now, a right to sue the drawers on them and to recover from the drawers the amount due to her upon the bills, with interest and expenses. And, in addition to this, if she were to sue the drawers in Tobago, she would be entitled by the laws of that island to recover from them a further sum by way of damages at the rate of 10 per cent.

The drawers contend that, under the law of Tobago, they are liable to pay Mrs. Horsford 300*l.*, in addition to the balance of 800*l.* and interest and expenses, and that the debtors are under an obligation to indemnify them against this liability, and they accordingly seek to prove for 300*l.* against the debtors' estate. This proof the trustee disputes. The rest of their proof has been allowed, and is not now in question.

We will first consider the liability of the drawers to pay Mrs. Horsford anything under the 10 per cent. clause in the statute of Tobago. She can, if she chooses, send the bills to Tobago and sue the drawers there upon them, and, if she were to do so, she would recover, not only the balance of 800*l.* and interest and expenses, but 10 per cent. damages in addition. Here, then, is a liability to which the drawers are subject, and, if the debtors are under an obligation to indemnify them against this liability, the drawers are entitled to prove in respect of it against the debtors' estate. (See s. 37 of the Bankruptcy Act, 1883.) No doubt the liability of the drawers to pay the damages in question is subject to a contingency, viz., the contingency of Mrs. Horsford suing them in Tobago, and the liability of the debtors to indemnify them is subject to the same contingency. But liabilities subject to contingencies are expressly made provable by s. 37 of the Bankruptcy Act, 1883, and, in order to entitle the drawers to prove against the debtors' estate, it is not necessary that they should first discharge their liability by paying the amount which they can be compelled to pay. Their liability to pay entitles them to prove, if they in turn are entitled to be indemnified by the debtors. This, then, is the next point for consideration, and it turns on the proper construction of the Bills of Exchange Act, 1882.

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Prior to the passing of that Act it was settled by *Francis* v. *Rucker* (1), *Walker* v. *Hamilton* (2), and *In re General South American Co.* (3), that, if the drawer of a bill had paid the holder damages for what is called re-exchange, the drawer could recover the amount so paid from the acceptor. Unless, therefore, the acceptor's liability to pay such damages has been abolished by statute, his liability to indemnify the drawer against his liability to pay them will be provable under s. 37 of the Bankruptcy Act, 1883, against the estate of the acceptor, as already pointed out. [The Lord Justice referred to ss. 54, 55, 57, and 97 of the Bills of Exchange Act, 1882, and continued:—] Sects. 54 and 55 draw a distinction between the liability of an acceptor and the liability of a drawer. The liability of the acceptor is to pay the bill (s. 54). The drawer not only engages that the bill shall be paid, but he also engages to compensate the holder if it is not paid. Sect. 54, does not, however, say what the consequences are to an acceptor who does not pay, nor does s. 55 say what the consequences are to a drawer who does not fulfill his engagement.

These consequences are dealt with in s. 57. Sub-s. (1) deals with bills dishonoured at home, and sub-s. (2) deals with bills dishonoured abroad. The bills now in question were drawn abroad, but they were payable, and accepted, and dishonoured in this country, and, therefore, if provided for at all, they fall within sub-s. (1) and not sub-s. (2) But, according to sub-s. (1), neither the acceptor, nor any one else, is liable to pay more than the amount of the bill and interest, and expenses of noting and protest. But this sub-section does not appear to be addressed to the case of a bill the drawer of which is liable to damages for re-exchange. The liability of the drawer in the present case to pay damages to the holder for re-exchange, depends on the law of Tobago, and not on s. 57 of the Bills of Exchange Act. Sub-s. (1) of s. 57 is not applicable to him at all, and s. 97, which must be read together with s. 57, preserves the former liability of the acceptor to indemnify the drawer against his liability in such a case. This construction of the two sections is obviously just. The acceptor of a bill drawn abroad knows that, in the

(1) Amb. 671. (2) 1 De G. F. & J. 602.
(3) 7 Ch. D. 637.

event of dishonour, there is a liability for re-exchange, and sub-s. (1) of s. 57 is not addressed to this point, and does not deal with it, but s. 97 has been added to meet cases not exhaustively dealt with by the other sections of the Act.

Having thus arrived at the conclusion that the Bills of Exchange Act does not exclude the right of proof in respect of the acceptor's liability to indemnify the drawers against damages for re-exchange, it remains to consider the amount for which the proof is to be entered. Mrs. Horsford, the holder of the bills, has not returned them to Tobago, and has not, therefore, entitled herself to the 10 per cent. damages to which she would be entitled by the law of that island if she had returned it there. But she can do this at any moment, and, if she would gain anything by it, she would no doubt return the bill there and sue the drawers upon it. They do not desire to put her to this unnecessary trouble and expense, and they admit their liability and are ready to pay her what she is entitled to. This amount, whatever it may be, is the value to be put on the liability of the debtors for the purposes of proof. The learned judge has thought that Mrs. Horsford could recover 10 per cent. on the whole sum for which the bills were drawn, in other words 300*l.*, and he seems to have assumed that the drawers had accounted to her, or would account to her, on this basis. But there was no evidence of this, and the assumption is against the probabilities of the case. It was urged on the part of the trustee that the utmost she could recover would be 10 per cent. on the amount due on the bills at the time of bringing an action upon them—in other words 80*l.* This point turns upon the true construction of the Tobago statute. There is no evidence before us of the construction put upon it in Tobago, and, in the absence of evidence shewing that Mrs. Horsford could recover the full sum of 300*l.*, it appears to us that the law of Tobago ought to be construed as only entitling her to 80*l.* Omitting interest, and expenses of noting and protesting, the question may be put in this form. Could Mrs. Horsford now recover in Tobago 1100*l.* (that is 3000*l.*, plus 300*l.*, minus 2200*l.*, the amount now paid on account of the bills) as contended by the drawers, or could she only recover 880*l.*, that is 800*l.* (the

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amount now due on the bills) plus 80*l.*, as contended by the trustee? The law of Tobago does not say on what sum the 10 per cent. is to be reckoned, nor does it refer to any time during which the 10 per cent. is to be computed. Supposing that before action the drawers had paid Mrs. Horsford the whole amount of the bills, with interest and expenses, could she nevertheless have sued them for 300*l.* damages under the statute, on the ground that the bills were not paid at maturity? In the absence of evidence that the law of Tobago would entitle her to do so, we cannot think that she could, in the case supposed, recover any damages at all. In the absence of evidence to the contrary, it appears to us that the 10 per cent. recoverable under the Tobago statute is 10 per cent. on the amount due on the bill at the time when the action is brought. For these reasons we have come to the conclusion that the learned judge was right in admitting the liability of the drawers to proof, but that the amount of the proof should be reduced from 300*l.* to 80*l.*

As each side has partly succeeded and partly failed on the appeal, the only order as to costs will be that the trustee shall have his costs of the appeal out of the debtors' estate.

Solicitors for trustee: *Druces & Attlee.*
Solicitors for executors: *Lowless & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

1886
Nov. 26.

EX PARTE TAYLOR. IN RE GOLDSMID.

Bankruptcy—Fraudulent Preference—Motive of Debtor—Payment to make good Breach of Trust—Bankruptcy Act, 1883 (46 & 47 *Vict c.* 52), *s.* 48.

In order that a payment or transfer of property, made by a bankrupt within three months before the presentation of the petition on which he was adjudicated a bankrupt, should amount to a fraudulent preference within s. 48 of the Bankruptcy Act, 1883, it is essential that it should have been made by him "with a view of giving a preference" to the creditor to whom it was made; it is not sufficient that the creditor was in fact preferred.

The Court must, therefore, in each case consider as a question of fact what was the real or dominant motive of the bankrupt in making the payment or transfer, and, if the Court comes to the conclusion that the bankrupt's real motive was (e.g.) to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference.

It is also essential that the relation of debtor and creditor should have existed between the parties at the time when the payment or transfer was made. Consequently, a voluntary payment to make good a breach of trust committed by the bankrupt is not within s. 48.

Ex parte Stubbins (17 Ch. D. 58) followed.

APPEAL against the refusal of Cave, J., to declare that a payment of 3000*l.*, made by B. G. Goldsmid, a bankrupt, just before the commission of the act of bankruptcy on which the adjudication was made against him, was a fraudulent preference, or that it was made with notice by the payee of a previous act of bankruptcy, and to order the 3000*l.* to be repaid.

The bankrupt was a stockbroker. He was one of the trustees of his father's will, the other trustees being Sir Frederick Goldsmid and Mr. S. F. Taylor. Taylor was the bankrupt's solicitor. Some bonds which formed part of the trust property were allowed by his co-trustees to remain in the sole custody of the bankrupt. In February, 1884, it was discovered that some of these bonds had disappeared, and Sir F. Goldsmid and Taylor required the bankrupt to give them an indemnity against any liability to which they might be subject by reason of their having allowed the bonds to remain in his sole custody. He accordingly, on the 1st of March, 1884, executed a deed, made between himself and

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Taylor, by which he covenanted to pay to Taylor on the 1st of September then next the sum of 3000*l.* (the estimated amount of the loss) with interest, and any further moneys which might be then due by him to Taylor, with interest, and assigned to Taylor by way of security his interests under the wills of two aunts. Another deed of same date was executed by which it was declared that the mortgage created by the first deed was given in order to secure and reimburse to Taylor and Sir F. Goldsmid, as trustees under the will of the bankrupt's father, or other the trustees of the will, any loss to which the trustees might be put by reason of the bonds having been retained in the sole custody of the bankrupt. The bankrupt also covenanted that he would deposit such bonds in the joint names of the trustees, on or before the 31st of December, 1885, and would indemnify them against all losses and costs. And it was provided that, when the covenants thereinbefore contained had been performed, the mortgage of even date should be void, and also that if, during the continuance of the security, the bankrupt should become entitled to any interest under the will of another aunt (who was then living), such benefits should be added to the security. The bankrupt did not either pay the 3000*l.* at the time appointed, or perform the other covenants.

In October, 1884, he misappropriated some more bonds belonging to his father's trust estate. On the 15th of March, 1885, he became entitled to certain benefits under the will last mentioned, and on the 23rd of March, 1885, he executed another deed (also made between himself and Taylor) by which, in consideration of the 3000*l.* and of a further sum of 17,000*l.*, stated to be due by him to Taylor, and in pursuance of his covenant contained in the second deed of the 1st of March, 1884, he assigned to Taylor his interest under the will by way of security for the payment of the 3000*l.* and 17,000*l.* and interest, and also charged the property comprised in the first deed of the 1st of March, 1884, with the payment of the 17,000*l.* and interest, as well as the 3000*l.* and interest.

Before the 23rd of March, 1885. Taylor had received information that the bankrupt had misappropriated some other securities, which were in his hands as one of the trustees under another will,

and that he had deposited these securities with some bankers, as security for advances made by them to himself.

In December, 1884, the bankrupt was employed as a broker by the trustees (of whom Taylor was one) of the marriage settlement of a Mr. and Mrs. Harrison, to sell some Eastern Bengal Annuities, which formed part of the funds subject to the trusts of that settlement, and to reinvest the proceeds in the purchase of East India Deferred Annuities.

The bankrupt effected the sale, and on the 2nd of January, 1885, he received the purchase-money, which amounted to 2916*l.* He also entered into a contract for the purchase of the East India Deferred Annuities for the reinvestment, but owing, as the bankrupt alleged, to the inability of the jobber with whom the contract was made to procure the required amount of those annuities, the proceeds of sale remained in the bankrupt's hands. On the 26th of March, 1885, Taylor, who had been pressing the bankrupt to complete the transaction, had an interview with him, in the course of which the bankrupt confessed that he had forged transfers of the securities, which he had deposited with the bankers. Taylor thereupon told him that he could not trust his statement as to the reason for the non-completion of the purchase of the East India Deferred Annuities, and demanded immediate payment of the proceeds of sale of the Eastern Bengal Annuities, threatening that, if the bankrupt did not pay the money at once, he would summon him before the Lord Mayor on a charge of embezzlement. The bankrupt, thereupon, gave Taylor a cheque for 3000*l.*, which Taylor cashed the same day.

On the 28th of March the bankrupt committed an act of bankruptcy by absconding, and on the 8th of April a bankruptcy petition was presented against him, on which he was on the 21st of April adjudicated a bankrupt.

The trustee in the bankruptcy applied to Cave, J., to set aside the payment of the 3000*l.* to Taylor on the grounds (1) that the payment amounted to a fraudulent preference; (2) that the execution of the deed of the 23rd of March, 1885, was a fraudulent preference, and, therefore, an act of bankruptcy, and that Taylor received the payment of the 3000*l.* with notice of that act of bankruptcy.

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Cave, J., refused the application.

The trustee appealed.

Horton Smith, Q.C., and *F. Whinney*, for the appellants. In order to determine whether a transaction amounts to a fraudulent preference the Court has now simply to look at the words of s. 48 of the Bankruptcy Act, 1883. (1) It ought not to inquire into the motives of the bankrupt, or whether pressure was used by the creditor. It is sufficient that the creditor was in fact preferred: *Ex parte Griffith* (2); *Ex parte Hill.* (3) The decision in *Ex parte Stubbins* (4), that a voluntary payment to make good a breach of trust was not a fraudulent preference, was under the Bankruptcy Act, 1869.

By the covenant contained in the deed of the 1st of March, 1884, the bankrupt created the relation of debtor and creditor between himself and Taylor. Pressure on the part of a creditor may be taken into account if it was really the dominant motive inducing the bankrupt to make the payment, but not otherwise: *Thornton* v. *Hargreaves.* (5)

Cooper Willis, Q.C., and *Yate Lee*, for Taylor, were not heard.

LORD ESHER, M.R. (after stating the nature of the application, continued:—) It has been urged that the first thing we have to do is to construe s. 48 of the Act, and we have been asked to say that, on the true construction of that section, if a debtor who is unable to pay his debts as they become due from his own money, does make a payment in favour of one creditor, that of itself shews that he must have intended to prefer the creditor, and the payment is a fraudulent preference within s. 48, and

(1) Sect. 48 (1): "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

(2) 23 Ch. D. 69.

(3) 23 Ch. D. 695.

(4) 17 Ch. D. 58.

(5) 7 East, 544.

that we ought not to take into account any of the subsidiary matters which the Courts were formerly in the habit of taking into account in determining whether a transaction amounted to a fraudulent preference. The doctrine of fraudulent preference grew up from the decisions of judges and the Act was intended to codify those decisions, and yet it is argued that they have been all swept away, and that we ought now to look at nothing but the words of s. 48, and not make any inquiry into the actual intention of the bankrupt in making the payment in question. No doubt the Court of Appeal has said that the section of the Act is alone to be looked at, and the first thing, therefore, is to construe its words. The section deals with payments made "with a view of giving such creditor a preference over the other creditors," and we are asked in effect to strike out those words. That would be a very faulty construction. The Court must find not only that a payment was made to a particular creditor, but that it was made "with a view" of giving him a preference over the other creditors. It has been said that the Court must be satisfied that the preferring of the creditor was the predominant view of the debtor—that if he acted from mixed motives, the Court must find out which was the predominant view in his mind. That no doubt is so, though I should have been content to say that the payment must have been made with a view of preferring the creditor. What is meant by "with a view"? It is the same thing as with an "intent." The moment you come to this, that you have to perform the metaphysical operation of finding out what a man's intent was, surely then you ought not to throw away all the tests which have been adopted by great and careful judges for the purpose of doing this. You cannot throw out of account the fact that a man was threatened with something which he would not at all like, in order to see whether he did not act with the dominant view of getting rid of that pressure. You must also, as James, L.J., said, take into account the man's own mind, and see whether, if he has done a very wicked and abominable thing, he may not afterwards have been doing that which, if he had a scrap of conscience left, he ought to have done—repair his former evil deed. If you come to the conclusion that that was the dominant motive in his mind,

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you must hold that he made the payment, not with a view of preferring the person to whom he made it, but in order to satisfy his own conscience. It is impossible to lay down any exhaustive rule; the Court must judge from the particular facts of each case whether the debtor did make the payment with the view or intent of preferring the creditor.

To apply this to the present case. With regard to the payment of the 3000*l.* cheque, the relation of debtor and creditor did exist between the bankrupt and Taylor. The bankrupt was in a position in which exposure would have, at least, been infamy to him, and it was very likely to lead him into extreme danger. He was actually threatened with a criminal prosecution before a magistrate. Can we, under these circumstances, say that, when he made the payment, he made it with a view of preferring Taylor, rather than with the sole view of getting rid of the exposure with which he was threatened, and which would have been ruin to him in character as well as in money? So far from differing from the conclusion of Cave, J., I think the bankrupt cared no more for Taylor than for any other creditor, but that he acted solely with the view of saving himself from exposure, infamy, and danger. I do not think there was any fraudulent preference.

With regard to the other ground, the execution of the deed of the 23rd of March, the bankrupt had been guilty of a gross, and perhaps a fraudulent, breach of trust, and an application was made to him by Taylor, his co-trustee, to replace the trust money which had been lost. I do not say that threats were made use of, but great pressure was put on him. The relation of debtor and creditor did not exist between the parties. The relation was only that of trustee and co-trustee, honest trustee and defaulting trustee. No action of debt could have been maintained for the sum which was paid, and such a case is not within s. 48 at all. But, even if Taylor could be regarded as a creditor of the bankrupt, I think the other view comes in; the bankrupt had committed a gross breach of trust, and it could not be said that he executed the deed with a view of preferring Taylor, to whom it could bring no personal benefit. The deed must have been executed with the view of making good the breach of trust. Consequently, there

was no fraudulent preference and no act of bankruptcy, and the decision of Cave, J., must be affirmed.

Lindley, L.J. The trustee in the bankruptcy claims the repayment of the 3000*l.* by Taylor on two grounds: (1) that the payment amounted to a fraudulent preference; (2) that Taylor received the money with notice of a previous act of bankruptcy, viz., the execution of the deed of the 23rd of March.

As to the first ground, Taylor was apparently a creditor of the bankrupt in respect of a breach of trust which he had committed. But the question is, not only whether the payment was made in favour of the creditor, but whether it was made "with a view" to prefer him. Regard must be had to the "view" with which the payment was made. It was argued that it is sufficient if the creditor was actually preferred. That would be to strike out from s. 48 the words, "with a view of giving such creditor a preference over the other creditors." It is impossible to infer the debtor's view from the mere fact that the creditor was preferred. But, looking at the facts of this case, I think that Cave, J., drew the right inference, that the bankrupt's sole motive was to prevent an exposure of his conduct. Taylor was in a position to expose him, and had threatened to do so. It would be utterly untrue to say that the payment was made with a view to prefer Taylor.

As to the second ground, that the deed of the 23rd of March was a fraudulent preference, and, therefore, an act of bankruptcy, the first question is, whether s. 48 applies at all. It appears to me that it does not. A cestui que trust is not a creditor of his trustee, nor is a trustee a creditor of his co-trustee. In neither case do the parties stand in the relation of debtor and creditor. This was pointed out by James, L.J., in *Ex parte Stubbins* (1), and also by Lord Romilly, M.R., in *Sinclair* v. *Wilson.* (2) It does so happen that Taylor was also a creditor of the bankrupt, by reason of the covenant which he had entered into. But the deed was not executed with a view of preferring him; the object was to make good the breach of trust. The appeal must be dismissed.

(1) 17 Ch. D. 58.

(2) 20 Beav. 324.

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LOPES, L.J. Every one who studies s. 48 must come to the conclusion that the animus with which the particular thing is done by the debtor is an essential element in considering whether it is a fraudulent preference. The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference. Applying these tests to the present case, I am clearly of opinion that the bankrupt did not make the payment of the 3000*l.* with a view of preferring Taylor, but to avoid the evil consequences to himself of an exposure of his wrongdoing.

It is said, however, that the execution of the deed of the 23rd of March was a fraudulent preference and an act of bankruptcy. I am clearly of opinion that it was not, for I do not think that s. 48 applies to the state of things which then existed, the relation of debtor and creditor not existing between the bankrupt and Taylor. The transaction amounted to a restitution of trust funds which had been misapplied by the bankrupt, and the case of *Ex parte Stubbins* (1) established this, that "if a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate." Moreover, it is impossible to say that the bankrupt executed the deed "with a view" to prefer a creditor, even if Taylor could be regarded as a creditor. The bankrupt might have acted with a view to benefit the cestuis que trustent, but they were not his creditors in any sense of the word.

Appeal dismissed.

Solicitors for trustee: *Gregory, Rowcliffes, & Co.*
Solicitor for Taylor: *S. F. Taylor.*

(1) 17 Ch. D. 58.

W. L. C.

[IN THE COURT OF APPEAL.]

1886
Dec. 17.

MALLET *v.* HANLY.

Parliament—Vexatious Opposition to Bill—Costs—Summary Procedure to enforce Payment—28 *&* 29 *Vict. c.* 27, *ss.* 2, 3, 5.

Under the provisions of the Act 28 & 29 Vict. c. 27, for the summary recovery by an action of debt of the costs of vexatious opposition to a bill in parliament, the plaintiff, on filing the documents mentioned in s. 5 of the Act, is, unless the defendant has obtained leave from the Court to deliver a defence to the action, entitled as a matter of right to sign judgment for the amount certified by the parliamentary taxing officer to be due to him, but the defendant can after judgment is signed move to set it aside, on the ground that the parliamentary committee, which reported that the opposition to the Bill was vexatious, had no jurisdiction in the particular case.

The defendant cannot deliver a defence to the action without the leave of the Court.

Semble (Lopes, L.J., doubting), that leave to deliver a defence, on the ground that the committee had no jurisdiction, may be given before judgment is signed.

Since the Judicature Act a statement of claim is to be used by the plaintiff in place of the declaration referred to in s. 5 of the Act.

The defendants to such an action having, without first obtaining the leave of the Court, delivered a defence denying the jurisdiction of the parliamentary committee:—

Held, that judgment must be signed for the amount claimed, but that it would still be open to the defendants to move to set aside the judgment.

Decision of Denman and Hawkins, JJ., reversed.

Appeal against the refusal by a Divisional Court (Denman and Hawkins, JJ.) of an application by the plaintiff that he might be at liberty to sign judgment for the amount indorsed on the writ in the action, and the costs of the action, and that (if necessary) the defence delivered by the defendants might be set aside.

In the session of Parliament in 1886 a bill was introduced to authorize the abandonment of certain tramways, the construction of which had been authorized by the Skegness, Chapel, St. Leonards and Alford Tramways Act, 1883. The promoter of the bill was Henry Mallet, the plaintiff in the action. A petition against the bill was presented to the House of Commons in the name of a company called the Skegness and St. Leonards Tramway Company, the petition being sealed with the company's seal. The defendants to the present action, C. J. Hanly and

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J. C. Fisher were directors of that company. On the 17th of May, 1886, the committee of the House on railway bills reported to the House that they found the allegations contained in the preamble of the bill as amended by them to be true, and reported the bill with amendments. They further reported that they were unanimously of opinion that Henry Mallet, the promoter of the bill, had been vexatiously subjected to expense in the promotion of the bill by the opposition of Hanly and Fisher, the directors of the above company, petitioners against the bill, and that Mallet was entitled to recover from Hanly and Fisher the proportion of his costs in relation to the promotion of the bill incurred since the 11th of May, 1886.

In accordance with the provisions of the Act, 28 & 29 Vict. c. 27, application was made by Mallet's solicitors to the taxing officer of the House for the taxation of Mallet's costs, and that officer on the 8th of November, 1886, certified that he had taxed the costs at 227*l.* 16*s.* 7*d.*, and that in addition to that sum he had allowed 5*l.* 5*s.* for costs and fees in respect of the taxation, which sums of 227*l.* 16*s.* 7*d.* and 5*l.* 5*s.* Hanly and Fisher were liable to pay to Mallet.

The plaintiff then issued the writ in this action, which was indorsed with a statement of claim, which stated that "the plaintiff's claim is for 233*l.* 1*s.* 7*d.*, being the amount of costs in relation to the promotion of the Skegness, Chapel, St. Leonards and Alford Tramways (Abandonment) Bill, awarded to be paid by the defendants to the plaintiff by a committee of the House of Commons, pursuant to the statute 28 & 29 Vict. c. 27, and which costs were taxed pursuant to the said statute at the sum of 233*l.* 1*s.* 7*d.*, as appears by a certificate of the taxing officer of the House of Commons dated the 8th of November, 1886." Particulars of the amount claimed were also given.

On the 22nd of November the defendants appeared to the writ, and the same day they delivered a defence, by which they denied that the amount sued for was the amount of costs in relation to the promotion of the bill awarded to be paid by the defendants to the plaintiff by a committee of the House pursuant to the statute 28 & 29 Vict. c. 27. They denied also that such costs were taxed pursuant to the statute at 233*l.* 1*s.* 7*d.*, or at all. And

they said that the alleged certificate of the taxing officer was given without jurisdiction, and was invalid.

Application was made on behalf of the plaintiff to the proper officer of the Court to sign judgment for the amount claimed. He was at the same time informed that the defendants had delivered a defence, and he refused to sign judgment.

The plaintiff applied to a master for a direction to the officer to sign judgment, but he refused the application, and his order was affirmed by Pollock, B., in chambers.

The above-mentioned application was then made to the Divisional Court on the 2nd of December, and was refused.

The plaintiff appealed.

Littler, Q.C., and *T. W. Chitty*, for the plaintiff. Under the provisions of the Act 28 & 29 Vict. c. 27 (1), the plaintiff is

(1) Sect. 2 provides that "when the committee on a private bill shall decide that the preamble is proved, and further unanimously report that the promoters of the bill have been vexatiously subjected to expense in the promotion of the said bill by the opposition of any petitioner or petitioners against the same, then the promoters shall be entitled to recover from the petitioners, or such of them as the committee shall think fit, such portion of their costs of the promotion of the bill as the committee may think fit, such costs to be taxed by the taxing officer of the House as hereinafter mentioned, or such a sum for costs as the committee shall name, with the consent of the parties affected."

Sect. 3 provides for the taxation of the costs by the taxing officer of the House, and that "he shall deliver to the parties affected, or either or any of them, on application, a certificate signed by himself expressing the amount of such costs, . . . with the name of the party liable to pay the same, and the name of the party entitled to receive the same, and such certificate shall be conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same from the party therein stated to be liable to the payment thereof."

Sect. 5. "The party entitled to such taxed costs . . . may demand the whole amount thereof, so certified as above, from any one or more of the persons liable to the payment thereof, and, in case of non-payment thereof on demand, may recover the same by action of debt in any of Her Majesty's Courts of Record at Westminster or Dublin, or by action in the Court of Session in Scotland. In such action it shall be sufficient, in England or Ireland, for the plaintiff to declare that the defendant is indebted to him in the sum mentioned in the said certificate; and the said plaintiff shall, upon filing the said declaration, together with the said certificate and an affidavit of such demand as aforesaid, be at liberty to sign judgment as for want of plea by nil dicit, and take out execution for the said sum so men-

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entitled as of right, upon filing the documents mentioned in the Act, to sign judgment. If the defendants wish to call in question the validity of the certificate for want of jurisdiction, they can do so after judgment is signed by motion to set the judgment aside: *Williams* v. *Swansea Canal Navigation Co.* (1); and that is their proper and only remedy. They have no right to deliver a defence to the action, and the defence which they have delivered is a mere nullity. Before the Judicature Act the Court of Chancery would have granted an injunction to restrain an action upon a certificate which had been improperly obtained: *Swansea Canal Proprietors* v. *Great Western Ry. Co.* (2) The plaintiff, having complied with the requirements of s. 5, is absolutely entitled to sign judgment, whatever may be the consequence.

[LORD ESHER, M.R. Does not "*such* certificate" in s. 5 mean a certificate given by a person who had jurisdiction to give it?]

The report of the committee is quite regular, and the certificate is signed by the proper officer. All that the plaintiff asks is leave to sign judgment; this will not prevent the defendants from having it set aside, if the committee acted without jurisdiction. It is immaterial whether the defendant appears or not; if he does not, judgment goes against him by default; if he does, the plaintiff is entitled to plead nil dicit. The action is a mere piece of machinery to enforce the certificate of the taxing officer. If the contention of the defendants is right, then in every case of this kind a defence may be delivered, and the Act will be nullified, though it says that the certificate is to be conclusive evidence. On an application to set aside the judgment the Court could impose proper terms, such as the payment of the money into court. The onus is on the defendants to shew want of jurisdiction.

H. D. Greene, Q.C., *Henry Kisch*, and *Fraser Macleod*, for the defendants. The notice of motion is for leave to sign judgment, not for an order upon the officer of the Court to sign it. There is no evidence that he refused to do so. The affidavit of demand

tioned in the said certificate, together with the costs of the said action, according to due course of law; Provided always, that the validity of such certificate shall not be called in question in any court."

(1) Law Rep. 3 Ex. 158.

(2) Law Rep. 5 Eq. 444.

for payment did not verify the certificate as being that of the officer of Parliament. The requirements of s. 5 have not been complied with, and on the materials before them the Divisional Court were right in refusing the application. The plaintiff has not "declared" as s. 5 requires that he should do. The declaration therein mentioned has not been abolished by the Judicature Act in the sense that the plaintiff must make and file a statement that the defendant is indebted to him in the amount claimed, though it may perhaps now be in the form of a statement of claim. This the present plaintiff has not done. The declaration and the certificate must be filed "together"—i.e., at the same time. The statute did not intend that the defendant should be unable to put in any defence to such an action as this. He must be entitled to question the jurisdiction of the committee. The Court is not precluded from dealing with the question of the identity of the person who is served with the certificate, or whether there even was a certificate within the meaning of the Act. It is admitted that the certificate is signed by the proper officer, though there was no evidence of this before the Divisional Court.

Littler, Q.C., in reply.

LORD ESHER, M.R. If we look at the substance of the case, the facts are plain enough. There was an application to Parliament for a bill, and it was opposed. Amongst the opponents who petitioned there was a company. It is undoubted that the petition was under the seal of the company, and it was accepted as the petition of the company. It is equally clear that that petition was managed by the two persons who are named as defendants to this action. The parliamentary committee by whom the case was heard reported that the promoter of the bill, the present plaintiff, had been vexatiously subjected to expense in the promotion of the bill by the opposition of the defendants, and that he was entitled to recover from them a certain proportion of his costs in relation to the promotion of the bill. It is clear, therefore, that the committee came to the conclusion that these two defendants ought personally to pay these costs. The proper officer of Parliament taxed the costs and gave his certificate,

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intending to act according to the statute, and that certificate and the report of the committee were meant to apply to the two defendants. Thereupon the plaintiff issued his writ in this action, and served it upon the defendants. The defendants then delivered a defence which denied the jurisdiction of the committee to make the report, but they had not obtained leave from any Court to deliver that defence. They delivered it as between the parties. The plaintiff, ignoring the defence, took a copy of the indorsed writ, with the certificate, or a copy of it, and an affidavit of demand, to the officer of the Court, and requested him to file those documents and to sign judgment for the amount claimed. The officer declined to do so, and thereupon the plaintiff applied to a judge at chambers to order these things to be done by the officer. The judge seems to have referred the matter to a Divisional Court. When the plaintiff went before the Divisional Court he seems to me to have made his application not strictly in the proper form—viz., asking the Court to review the decision of the judge at chambers, and to order the officer to sign judgment, and the judges of the Divisional Court seem to have thought that they ought to follow the procedure laid down in the Act with the utmost strictness, and they applied that strictness to the form in which the matter was brought before them. With great deference to them, I think that, instead of going to the substance of the case, they dealt only with the form of the application. We intend, as we always do in this Court, to disregard the form altogether and to deal with the substance of the case, because, if there has been any error in form, we can set that right by the way in which we deal with the costs.

Now, the substance of the case raises some questions of considerable difficulty, but, in my opinion (though I cannot say that is the opinion of the whole Court), when such an action is brought, and a defendant to it desires to suggest that he is not the person named in the report of the parliamentary committee, that they did not intend to name him, or that the certificate has not been made by the proper taxing officer of Parliament, or that there has been no committee at all, or anything which shews that the certificate given in pursuance of the finding of the committee is so made as to be beyond the jurisdiction of the committee (and

it is only to that extent, I think, that the certificate can be questioned), there is nothing in the Act to prevent him from asking the Court, before the documents mentioned in s. 5 are taken to the officer of the Court, to intercept the action of the officer and to allow the defendant to plead in the action. But the only plea which the defendant could be allowed to plead would be one shewing that he was a person who had not been brought within the jurisdiction of the parliamentary committee.

I think there is nothing to prevent the Court from doing this. It was decided by Wood, V.-C., in *Swansea Canal Proprietors* v. *Great Northern Ry. Co.* (1), that, if a parliamentary committee had exceeded its jurisdiction, an injunction could be granted to prevent the action from proceeding. Injunctions of that kind have been abolished by the Judicature Act. I am inclined to think that a plea to the jurisdiction might have been allowed, even when the Courts of Chancery and Common Law were separate courts, but, now that they are joined together, such a plea has precisely the same effect as an application for an injunction would have had. I think that, with the leave of the Court, it might have been put in. But, I repeat, it could only be a plea going to the jurisdiction, and shewing that the parliamentary committee, having only a limited authority to deal with petitioners, has exceeded its jurisdiction. But, in my opinion, such a defence cannot be pleaded without the leave of the Court, and, if that leave has not been given, so as to intercept the right of the plaintiff to go before the officer of the Court, in my opinion, when he goes to the officer with the proper documents, the officer has no right to exercise any discretion whatever, but is bound to file the documents and sign judgment. If judgment is signed, I have no doubt that the Court would still have the right to consider whether it ought to be set aside. The validity of the certificate could not be questioned if there was jurisdiction to make it, but the Court might still at that stage discuss and decide whether the certificate had been given under such circumstances as make it a certificate given in accordance with the Act. That is the only question which can be raised then. If there is no dispute

(1) Law Rep. 5 Eq. 444.

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about the facts, and the question is merely one of law, the Court can decide it upon their own view of the law, and, if upon that view of the law they come to the conclusion that there has been an excess of jurisdiction, then, I should say, they would simply set aside the judgment then and there. But, if there are disputed questions of fact, the Court would, upon setting aside the judgment, treat the action like any other action, allowing the defendant to plead a plea disputing the fact that the parliamentary committee had jurisdiction. If the parliamentary committee have jurisdiction to make their report, you cannot enter into the question whether they have exercised their jurisdiction rightly or wrongly in point of justice, or truth, or fact. That is a matter entirely for them.

How, then, does the present case stand? No leave was obtained by the defendants to put in what I may call an intercepting plea, and, therefore, I think the officer of the Court was bound, when the documents were taken to him, to file them and to sign judgment, and the judgment of this Court must be that he is to do so now.

But this will not prevent the defendants, when the judgment is signed, from applying to the proper Court to set it aside, and, if that Court upon the materials before it is of opinion that there is no doubt about the facts, but that there is a question of law (as I am inclined to think there is), the Court would, I should think, at once decide the question of law, and say whether the defendants ought to be treated as petitioners against the bill. If the Court thinks that there is a question of fact which requires investigation, they may set aside the judgment and allow the defendants to put in a plea equivalent to that which they have put in, but only to that extent, and then the question of fact will be decided. If the Court thinks that the defendants were properly treated as petitioners, and that the parliamentary committee had jurisdiction to make the report which they have made, and that the taxing officer had jurisdiction to issue the certificate which he has issued, then they will leave the judgment to stand.

As to the objection that the plaintiff has not made any "declaration" within the meaning of s. 5, in my opinion the documents which are now delivered under the Judicature Act, for

precisely the same purpose as declarations previously were delivered, and are intended to take their place, are, though they are in a different form, "declarations" within the meaning of this Act. An indorsed writ or a statement of claim, which are used for precisely the same purpose as a declaration was used under the old procedure, is a "declaration" within this Act.

The result is that we allow the appeal, and as the appellant was obliged to come to this court, and his application ought not to have been resisted, the respondents must pay the costs of the appeal. But, under the circumstances, considering the blunders which have been made, I think no costs ought to be given of any of the proceedings from the time when the master refused to sign judgment up to the hearing of this appeal.

LINDLEY, L.J. I am of the same opinion.

Several points of some difficulty and some novelty have been discussed, but the solution of the case is, I think, tolerably easy. The effect of the Act is to give persons who have obtained certificates for their costs from the proper taxing officer of the House of Parliament, a summary remedy to obtain payment. That is the whole object of the Act, and the remedy is an action of debt, with liberty for the plaintiff to sign judgment, upon filing a declaration and the certificate and an affidavit of demand.

The present plaintiff has endeavoured to comply with the provisions of the Act. There is a report of the committee; there is a certificate of the taxing officer in his favour, awarding a certain amount of costs to be paid by the defendants to him; and he has obtained an affidavit of demand, and has commenced an action for the amount in the High Court. He has not filed a declaration, because he cannot do so, there being no such thing under the present procedure, but he has taken that step which is now substituted for it; he has issued a writ indorsed with a statement of claim. He has taken the indorsed writ, the certificate, and the affidavit of demand to the proper officer in order to get them filed, but there he has been met with a difficulty in the

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refusal of the officer to file them, and by that refusal the whole of this litigation has been occasioned.

Let us look for a moment at the plaintiff's rights and then at the defendants' rights. The plaintiff's right, as it appears to me, is simply to go and file the documents mentioned in the Act, and then sign judgment, and, unless the defendant has obtained an order of the Court staying proceedings in the action, or something equivalent to that, he has no opportunity, and was not intended, so far as I can see, to have any opportunity, of delaying the plaintiff's proceedings. Certainly the defendant has no right to stay the signing of judgment by delivering a statement of defence without the leave of the Court; that would clearly be in the teeth of the Act. It was argued in substance that the defendant had no remedy but by moving to set aside the judgment. I do not agree with that. Before the Judicature Act a defendant to such an action could have obtained an injunction to stay the proceedings on proper grounds. The proper grounds would be, that there was no jurisdiction to make the certificate, or, as in *Swansea Canal Proprietors* v. *Great Western Ry. Co.* (1), that the certificate itself was not such as was required by the Act. Injunctions to stay actions have ceased to exist, but it does not follow that the defendant has not still in a proper case some similar mode of preventing judgment being signed against him, and I think the proper mode now is to apply for a stay of proceedings, or, in the alternative, for leave to defend the action. I cannot see why the defendant should not be at liberty to do this in an action commenced under this Act, just as in any other action. But the present defendants have not done this, and, unless they obtain from the competent authority—a judge of the High Court—an order staying the action (which would be equivalent to the old order for an injunction), or the Court gives special leave to defend, it appears to me that they have no right to defend, and that the plaintiff has a right to sign judgment. Of course the defendants could not obtain either liberty to defend, or a stay of proceedings, without disclosing to the Court some case shewing that there had been an excess of jurisdiction, or that the certificate was not in

(1) Law Rep. 5 Eq. 444.

accordance with the Act. The defendants, therefore, have been utterly in the wrong, and, though I think the plaintiff has not been quite right in his procedure, substantially he is entitled to that which he asks, and I quite agree that the proper order now to be made is to discharge the order of the Divisional Court, and to give the plaintiff liberty to sign judgment, upon his filing the writ and certificate and affidavit, if the writ has not been already filed; and that the defendants must pay the costs of the appeal, but that no other costs should be given. Of course, it will still be open to the defendants to move to set aside the judgment.

LOPES, L.J. I am of opinion that this appeal ought to be allowed. I would rather not express any opinion whether in certain circumstances the defendant to such an action might not obtain leave to defend. In the circumstances of the present case I am clearly of opinion that the plaintiff was entitled to sign judgment. The object of this Act was to supply a machinery for the recovery of the costs of a vexatious opposition to a bill in Parliament, when the committee had ordered those costs to be paid. Sect. 3 provides how the costs are to be taxed, and s. 5 provides the means by which they are to be recovered, that is, by an action of debt. In this case the defendants delivered a defence without the leave of the Court, and I am clearly of opinion that they were wrong in that, and that the plaintiff, having the proper documents (for there is nothing in the objection that the writ did not correspond to the old declaration), the writ, the certificate, and the affidavit, was, on tendering them to the proper officer, entitled to have judgment signed. I think that the officer was clearly wrong in refusing to sign judgment when those documents were tendered to him. All the formalities required by the Act had been complied with, and it was a merely ministerial act to sign judgment.

I agree with the other members of the Court that, when judgment has been signed, it will be open to the defendants to move to set it aside. When the Court hears that application it can, if it thinks fit, upon the evidence brought before it, determine what is the proper order to make, or if, on the other hand, it

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considers that it has not then sufficient materials before it, the Court may permit the defendants to plead.

LINDLEY, L.J. I quite agree with what my Brother Lopes has last said.

Solicitors for plaintiff: *Torr & Co., for Travell & Woodward, Nottingham.*

Solicitor for defendants: *W. Whitfield.*

W. L. C.

Nov. 17.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE JUSTICES OF THE CENTRAL CRIMINAL COURT.

Practice—Appeal—Jurisdiction—"Criminal cause or matter"—Property obtained by False Pretences—Pledge of, to Innocent Party—Sale of, by him—Power to order Restitution of Proceeds of Sale in Hands of Agent of Convicted Prisoner—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—24 & 25 *Vict. c.* 96, *s.* 100.

By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the court before whom any such person shall be tried shall have power to order the restitution thereof in a summary manner.

The Queen's Bench Division having discharged a rule for a certiorari to remove an order for restitution made under the above section:—

Held, that the order of the Queen's Bench Division was a judgment "in a criminal cause or matter" within s. 47 of the Judicature Act, 1873, and that there was no appeal to the Court of Appeal.

Held, further, that an order may be made under the above section for the restitution of the proceeds of the property, as well as of the property itself, and that it may be made upon an agent who holds such proceeds for the convict, without notice of the fraud.

APPEAL from a judgment of the Queen's Bench Division (1); the facts sufficiently appear from the judgments and from the report of the case in the court below.

Abrahams, for the respondent. There is a preliminary objection to the hearing of this appeal. The order for the restitution of the goods was made in a "criminal cause or matter," within

(1) Reported 17 Q. B. D. 598.

the meaning of s. 47 of the Judicature Act, 1873, and no appeal will lie from the decision of the Divisional Court. (1)

E. Wilberforce, for the appellants. The right of appeal given by s. 19 of the Judicature Act, 1873, is very wide, and is only subject to the limitation imposed by s. 47 of that Act; this is not a judgment in a criminal cause or matter within the latter section. The first test is, to consider whether the proceeding on which, or on any step in which, the judgment was given, might result in fine or imprisonment; for in all cases where it has been decided that no appeal lay, either the appellant or respondent might have been liable to fine or imprisonment as a consequence of the proceeding on which the appeal was brought: *Reg.* v. *Fletcher* (2); *Loughborough Highway Board* v. *Curzon* (3); *Mellor* v. *Denham.* (4) It is true that the statutory remedy by restitution conferred by 21 Hen. 8, c. 11, and by 24 & 25 Vict. c. 96, s. 100, is exerciseable only by the Court before which the felon is tried: *Reg.* v. *Lord Mayor of London* (5); but restitution is a civil matter arising out of the criminal trial, and a writ of restitution could be pleaded to: *Burges* v. *Coney* (6); *Bishop of Worcester's Case.* (7) If no order is made under the statute for the restitution of stolen property, the owner may sue in trover: *Scattergood* v. *Sylvester* (8); though in a case decided before 7 & 8 Geo. 4, c. 29, s. 57, it was held that he could not have sued where the only conversion was before the thief's conviction, and before the property had revested in the original owner: *Horwood* v. *Smith.* (9)

[LOPES, L.J., referred to *Reg.* v. *Foote* (10), where it was held

(1) By s. 19 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Court of Appeal has jurisdiction to "hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice."

By s. 47, ". . . no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the judges under" 11 & 12 Vict. c. 78.

(2) 2 Q. B. D. 43.

(3) 17 Q. B. D. 344.

(4) 5 Q. B. D. 467.

(5) Law Rep. 4 Q. B. 371.

(6) Tremaine's Pleas of the Crown, p. 315; (and see Kelyng's Crown Cases pp. 35, 48.)

(7) Moore, 360.

(8) 15 Q. B. 506.

(9) 2 T. R. 750.

(10) 10 Q. B. D. 378.

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by the Court of Appeal that a refusal by the Divisional Court to grant bail was a judgment in a criminal cause or matter.]

In that case the jury had been discharged without giving a verdict, and the criminal proceedings were not at an end. In *Reg.* v. *Steel* (1) it was held that the taxation of costs on a criminal information was not a matter of appeal; but that was on the ground that the costs were a necessary consequence of the judgment, and that therefore the order for costs was part of the procedure in a criminal matter. This was also the ratio decidendi in *Reg* v. *Latimer.* (2)

Another test is whether the object of a given proceeding is punishment or only redress; in the former case the proceeding itself is one in a criminal matter, in the latter it is a civil one: *Attorney-General* v. *Radloff* (3), per Platt, B.; *Attorney-General* v. *Bradlaugh* (4), per Brett, M.R. (5); and the object of the proceeding in the present case is the recovery of the stolen goods or their proceeds. The prosecutor had the choice of three remedies; the Act of 21 Hen. 8, gave him a right of action, and also gave the justices before whom the prisoner was tried power to order a writ of restitution, both of which are civil remedies; and 7 & 8 Geo. 4, c. 29, superadded an order for restitution in a summary manner, thus adding a third civil remedy to the two already existing.

There is error upon the record; the defect appears on the face of the order appealed from; the order of the Divisional Court is drawn up on the rule nisi, which makes the order of the judge at the Central Criminal Court an exhibit; his order may therefore be looked at by this Court; all the orders together make up the record. In the cases referred to in the judgment of the Divisional Court the proceeds of the robberies were still in the possession of the thief at the time of his conviction; if they have passed out of his possession, they cannot be the subject of such an order: *Lindsay* v. *Cundy* (6) (reversed on another point); *Moyce* v. *Newington.* (7) It is contended for the respondent that the fact

(1) 2 Q. B. D. 37.
(2) 15 Q. B. 1077.
(3) 10 Ex. 84.
(4) 14 Q. B. D. 667.
(5) Page 690.
(6) 1 Q. B. D. 348; 2 Q. B. D. 96.
(7) 4 Q. B. D. 32.

that in *Lindsay* v. *Cundy* (1) there had been a sale of the goods to the defendant by the offender himself distinguishes it from the present case, where the sale was only made by the appellants as his brokers; but the appellants had a lien on the proceeds, and a mere pledge is as effectual as a sale in giving to the pledgee rights which cannot be interfered with: *Attenborough* v. *London and St. Katharine's Docks Co.* (2)

[LORD ESHER, M.R. That was a case of interpleader; and in administering the equity of interpleader proceedings, the Court will say to whom the property in justice belongs.]

The power of ordering summary restitution given by s. 100 of the Larceny Act only arises in cases where the property is to be restored under the first part of the section; it is clear from *Lindsay* v. *Cundy* (1) and *Moyce* v. *Newington* (3) (4) that in such a case as this trover will not lie, and the property cannot be restored; the judge therefore exceeded his jurisdiction in making the order. Such an order may be quashed for excess of jurisdiction: *Reg.* v. *Corporation of London.* (5) Where a fact gives jurisdiction, and the Court, as in the present case, finds the fact, its excess of jurisdiction may be reviewed on certiorari.

[He also cited *Chichester* v. *Hill.* (6)]

Abrahams, for the respondent. The question whether the order is rightly made in point of law is not open upon an application for a certiorari: *Reg.* v. *King.* (7) There is no error apparent on the face of the order of the Divisional Court. It is not necessary to bring the case within s. 47 of the Judicature Act that the order should be a judgment of a criminal nature; it is sufficient if it is made in a criminal cause or matter. This order was made, as appears from the recital, on the trial of the prisoner, and the power to make it is given to, and is only exercisable by, the Criminal Court having jurisdiction to try him by virtue of its commission: *Reg.* v. *Lord Mayor of London.* (8) The cases relied on by the appellants are all cases of a bonâ fide

(1) 1 Q. B. D. 348; 2 Q. B. D. 96.
(2) 3 C. P. D. 450.
(3) 4 Q. B. D. 32.
(4) *Moyce* v. *Newington* has since been overruled by the Court of Appeal in *Vilmont* v. *Bentley*, post, p. 322.
(5) E. B. & E. 509.
(6) 52 L. J. (Q.B.) 160.
(7) 14 Cox, 434.
(8) Law Rep. 4 Q. B. 371.

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purchaser of goods holding the proceeds for himself; the present is the case of agents holding them for the prisoner.

[He was stopped by the Court.]

Wilberforce, in reply.

LORD ESHER, M.R. In this case the criminal was tried at the Central Criminal Court on a charge of obtaining flax by false pretences, and was convicted; and after the conviction the judge who tried him was asked to make, and made, an order on the appellants to restore to the prosecutor the money the proceeds of a sale by them of the flax. They had sold it as brokers for, and instructed by, the convicted criminal. With regard to that order, a motion was made in the Queen's Bench Division to bring it up by certiorari for the purpose of quashing it; but on the hearing the Court discharged the rule, and refused to make the order asked for, hence the present appeal.

It was urged in the first place against this appeal that this was an order made in a criminal matter, while the appellants contended that it was not so made, but that the order for restitution was made in a civil matter after the decision had been given in the criminal proceeding; and we have to decide what is the view that should be taken of the statute which gives the power of making the order. This power is given to the judge or Court which tries the criminal, and it seems that the order can, and what is more, ought to be, made practically at the time of the trial; I do not say that it must be made at the minute, but it must be made as one of the conclusions of the trial. On the true construction of the Act of Parliament, then, I am of opinion that the judgment of the Queen's Bench Division was an order made in a criminal matter; and if that is so, it is clear that no appeal lies here unless, it may be, the defect appears on the face of the order. I have great doubt in the present case whether the alleged defect does appear on the face of the order with which we have to deal; but it is unnecessary to decide the point. If it does appear, what is it that appears on the face of the order? That an order was made by a judge of the Central Criminal Court for the restitution of goods which it is not denied had been obtained by false pretences, and that it was made, not on a

stranger but, on the agents of the convicted criminal; that is, that it was an order for the restoration of the proceeds in the hands of the agents, which was the same as though they had been in the hands of the offender himself. I think that the Court has power to order not only the restitution of the things themselves, but also the proceeds of their sale in the hands of the convicted criminal, and the cases cited prove it; and if the proceeds are in the hands of an agent holding them for the convicted criminal, I think an order can be made against him. Further than that I do not go, and I say nothing as to the power to make such an order where the proceeds are in the hands of any one but an agent of the convict. In the present case I think that the judge had power to make the order, on the ground that the appellants were holding money as agents for the offender at the time of his conviction. It is true that they had a lien for part of the money, but that was only such a lien as would enable them in accounting to him to retain a part of the money for themselves; they were in any event bound to account to him, and they were his agents to hold for him the gross, and not merely the nett, proceeds of the sale. I am of opinion, therefore, that the judge had jurisdiction to make the order for restitution, and that even if the alleged defect is apparent on the face of the order (as to which I give no opinion) it does not shew that he had no jurisdiction.

LINDLEY, L.J. This is an appeal from a decision of the Queen's Bench Division discharging a rule nisi for a certiorari which had been obtained on March 19, the object of which was to remove into the Queen's Bench Division an order of Mr. Commissioner Kerr for the restoration of certain money, being the proceeds of the sale of the property which had been fraudulently obtained by a convicted prisoner, and the ground on which the rule was granted was, that the order was made without jurisdiction. The rule having been discharged there is an appeal to this Court. We have to consider the order appealed from and to decide whether it was made in a criminal cause or matter. This order of Mr. Commissioner Kerr was made under s. 100 of the Larceny Act, and the jurisdiction to make such orders is by that

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section conferred on the judge in the exercise of the criminal jurisdiction given to him, and the order itself is drawn up in the form of criminal orders. Though it affects property, it seems clear to me that the order is one which was made in a criminal cause or matter, and that the judges in the Divisional Court were right in so holding. Then, is this order a judgment within s. 47 of the Judicature Act, 1873? That section has received judicial interpretation before now in many cases, and it is clear from the decision in *Reg.* v. *Whitchurch* (1), that a rule absolute for a writ of certiorari is a judgment within the meaning of that section, and I am quite unable to see how it can be successfully contended that an order discharging a rule nisi is not also a judgment.

Stopping there, it is clear that there is no appeal to this Court unless it is apparent on the face of the order that it is erroneous. The order of the judge at the trial has been the subject of much argument, and I assume that his order is so incorporated in the order of the Divisional Court as to set out all the facts of the case, and that those facts would shew that the order of the judge was wrongly made. But where does that lead us? We have to consider whether the judge had jurisdiction to make the order, not whether he was right or wrong in making it. It seems impossible for us to say that he had no jurisdiction to make the order which he did; looking at the jurisdiction conferred by s. 100 of the Larceny Act, and bearing in mind the fact that the persons holding the money were the agents of the prisoner. I do not give any opinion whether the order was on the facts rightly or wrongly made.

LOPES, L.J. This is an order made under s. 100 of the Larceny Act, which authorizes the Court or judge to make an order for the restitution of stolen property, and the first question that we have to decide is, whether the order was made in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873; if it is so, there is no appeal from the judgment of the Divisional Court. The order was made by a judge who exercises criminal jurisdiction, and he could not have made it, except

(1) 7 Q. B. D. 534.

in the exercise of that jurisdiction. It is argued that he made it in a civil cause or matter; but it was made by the judge who tried the convict, and if we look at the caption of the order, it seems impossible to conclude but that it was made in a criminal matter within the meaning of the section.

But it is said that, even if it was made in a criminal matter, there is error apparent on the record, and there is still an appeal. Whether the record comes within the meaning of s. 47 of the Act of 1873 I do not say, and I express no opinion as to whether the alleged error is apparent on its face, which can only appear by incorporating in it the order made by the learned judge at the trial. There seems to be no error at all when the facts of the case are understood; the order was made on persons who held money as agents for the convict, and the case of *Lindsay* v. *Cundy* (1), and the other cases cited by the appellants' counsel do not apply. There is no doubt whatever that the criminal court has power to order restitution of the proceeds in the hands of the convict of the sale of stolen property; and his agents stand in the same position as the convict himself.

Appeal dismissed.

Solicitor for appellants: *Oldman.*

Solicitors for respondents: *Michael Abrahams, Son, & Co.*

(1) 1 Q. B. D. 348.

W. J. B.

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Dec. 10.

[IN THE COURT OF APPEAL.]

VILMONT *v.* BENTLEY.

Sale of Goods—Contract induced by False Pretences—Prosecution and Conviction of Fraudulent Buyer—Revesting of Property in Original Owner—Sale in Market overt—Innocent Purchaser—Order for Restitution—24 & 25 Vict. c. 96, *s.* 100.

Under 24 & 25 Vict. c. 96, s. 100—which provides that if any person guilty of a misdemeanor in obtaining goods (such as obtaining goods by false pretences) shall be indicted by the owner of the property and convicted, in such case the property shall be restored to the owner or his representative, and the Court before whom any person shall be tried for any such misdemeanor shall have power to award writs of restitution for the property, or to order the restitution thereof in a summary manner;—when a contract for the sale of goods has been induced by false pretences, and the owner of the goods has prosecuted the thief to conviction, the property in the goods revests in the owner on and at the date of the conviction, and he can then recover them from the person in whose possession they are, even though that person had before the conviction bought them in market overt, or otherwise, without notice of the fraud.

It is not necessary as a condition precedent to the recovery of the goods that an order of restitution should have been obtained.

Moyce v. *Newington* (4 Q. B. D. 32) overruled.

Decision of Denman, J., founded on that case, reversed.

Appeal (by special leave) from the judgment of Denman, J., upon an interpleader issue, directed to determine the title to certain goods.

In March, 1885, Galpin & Crochard, who carried on business at Amiens, in France, entered into a contract for the sale of the goods in question to one Hodder, in England. Galpin & Crochard were induced to enter into the contract by false pretences on the part of Hodder and a person named Klein. The goods were sent to Hodder, who pledged them with one Dobree: Dobree stored them in the shop or warehouse of a person named Starbuck, in the city of London. Starbuck exposed them for sale in his shop, and the defendant Bentley purchased them when thus exposed for sale in the ordinary course of business, and Dobree instructed Starbuck to hold them to the defendant's order. The fraud having been discovered Hodder was indicted and convicted for having obtained the goods by false pretences.

An order for the restitution of the goods was applied for at the trial, but was refused. Galpin & Crochard having claimed the goods from Starbuck, he interpleaded, and an issue was directed to try the right to the goods, the trustee in the liquidation of Galpin & Crochard (who had become insolvent) being plaintiff in the issue, and Bentley the defendant.

Denman, J., by whom the issue was tried without a jury, held, on the authority of *Moyce* v. *Newington* (1), that under the Act 24 & 25 Vict. c. 96, s. 100, in a case of obtaining goods by false pretences, the property of the original owner of the goods does not, on his prosecuting and obtaining a conviction of the thief, revest as against a purchaser for value without notice of the fraud, and that, consequently, the plaintiff was not entitled to the goods.

The plaintiff appealed.

Arbuthnot, and *Charles Mathews*, for the appellant. The case was decided by Denman, J., on the authority of *Moyce* v. *Newington* (1), in which, no doubt, it was held by the Queen's Bench Division, that under s. 100 of the Act 24 & 25 Vict. c. 96, the property in goods which have been obtained by false pretences does not, on the conviction of the person who obtained them, revest in the original owner as against an innocent purchaser. But that case is opposed to the principle laid down in previous decisions. The Act 21 Hen. 8, c. 11 (2), provided that the pro-

(1) 4 Q. B. D. 32.

(2) The Act 21 Hen. 8, c. 11, provided: "If any felon hereafter do rob or take away any money, goods, or chattels from any of the King's subjects from their person or otherwise within this realm, and thereof the said felon or felons be indicted and after arraigned of the same felony and found guilty thereof, the party so robbed or owner shall be restored to his said money, goods and chattels;" and the justices before whom the felon is found guilty are empowered "to award writs of restitution for the said money, goods and chattels, in like manner as though any such felon were attainted at the suit of the party in appeal."

This Act was repealed by 7 & 8 Geo. 4, c. 27, but was in substance re-enacted by s. 57 of 7 & 8 Geo. 4, c. 29, and its provisions extended to cases of misdemeanor. The Act 7 & 8 Geo. 4, c. 29, was repealed by 24 & 25 Vict. c. 95.

By 24 & 25 Vict. c. 96, s. 100: "If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security,

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perty in stolen goods should, on the conviction of the thief revest in the original owner. Under this Act it was held that the property in the goods revested as against an innocent purchaser in market overt: *Horwood* v. *Smith* (1); *Scattergood* v. *Sylvester*. (2) In the latter case the only contest was whether it was a condition precedent to the recovery of the goods that an order of restitution should have been obtained by the owner, and it was held that it was not. Other authorities to the same effect are *Parker* v. *Patrick* (3); *Peer* v. *Humphrey* (4); *Walker* v. *Matthews*. (5) And Lord Coke says (6), after stating the effect of the statute 21 Hen. 8, c. 11, "So as in this case also the party robbed, or owner, shall have restitution, notwithstanding any sale in market overt."

Sect. 100 of 24 & 25 Vict. c. 96, which extends to the misdemeanor of obtaining goods by false pretences, ought to be construed in the same way as the Act of Hen. VIII., and it has been so construed: *Reg.* v. *Stancliffe* (7); *Lindsay* v. *Cundy*. (8) The only exceptions from this course of authority are *Nickling* v. *Heaps* (9) and *Moyce* v. *Newington*. (10) The report of *Nickling* v. *Heaps* (9) is not very intelligible, and in *Moyce* v. *Newington* (10)

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or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been bonâ fide paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been bonâ fide taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security."

(1) 2 T. R. 750.
(2) 15 Q. B. 506.
(3) 5 T. R. 175.
(4) 2 A. & E. 495, 499.
(5) 8 Q. B. D. 109.
(6) 2 Inst. 714.
(7) 11 Cox, C. C. 318.
(8) 1 Q. B. D. 348.
(9) 21 L. T. (N.S.) 754.
(10) 4 Q. B. D. 32.

the Court must be taken to have misapprehended the effect of *Horwood* v. *Smith* (1) and *Lindsay* v. *Cundy*. (2) The result is that on the conviction of Hodder and Klein the property in these goods revested in Galpin and Crochard, notwithstanding the intermediate sale, and the plaintiff as their trustee is entitled to recover them from the defendant.

Lumley Smith, Q.C., and *C. E. Jones*, for the defendant. There are two questions, first, whether the title of a purchaser in market overt between the date of the offence and the conviction is overriden by this statute; secondly, whether under this statute a person who has bought the goods from one who had the property in them at the time, and whose title, though it was voidable, had not then been avoided, does not stand in a better position than a purchaser in market overt. In the present case the defendant occupies both these positions. *Moyce* v. *Newington* (3) is an express authority in his favour. The observations of the Court in *Lindsay* v. *Cundy* (2) were erroneous. That case afterwards went to the House of Lords, *Cundy* v. *Lindsay* (4), and was there decided on a different ground, but the point was argued, and Lord Cairns, L.C., said (5) that a purchaser of a chattel in market overt obtains a title which is good against all the world, and also that a purchaser from one who had obtained the chattel under a de facto contract purporting to pass the property, though voidable, acquires a good title if he purchases before the original contract is avoided. In the case mentioned in 2 Inst. 714, it was the king's officer who had sold the goods. In *Scattergood* v. *Sylvester* (6) the real question was whether the plaintiff's right of action was taken away by the remedy of applying for an order of restitution given by the statute.

This Court has really to construe the Act 24 & 25 Vict. c. 96, for the first time, for in *Lindsay* v. *Cundy* (2) the goods were not in the defendant's possession. There are two ways in which goods may be obtained by false pretences: (*a*) where there is no contract of sale; (*b*), where there is a contract of sale. In the former case no property passes from the original owner. In

(1) 2 T. R. 750.
(2) 1 Q. B. D. 348.
(3) 4 Q. B. D. 32.
(4) 3 App. Cas. 459.
(5) 3 App. Cas. p. 464.
(6) 15 Q. B. 506.

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the latter case the owner of the goods divests himself of the property in them, and then the ordinary rule of law applies, that of two innocent persons, the one who has enabled a fraud to be committed ought to suffer the loss. But for the statute it would be impossible to set aside the sale to the defendant: *White* v. *Garden*. (1) The reasonable construction of the Act is that, when goods have been obtained from the owner by false pretences under such circumstances that the property in them never passed from him, he is to have the additional remedy of an order of restitution. This was the view which Cockburn, C.J., took in *Moyce* v. *Newington* (2), and in *Babcock* v. *Lawson* (3), he expressed his adherence to it. The word "property" in the Act means the goods themselves: *The Queen* v. *The Justices of the Central Criminal Court*. (4) In *Lindsay* v. *Cundy* (5) it was only necessary to decide that the property in the goods did not revest before conviction.

LORD ESHER, M.R. In my opinion the appeal must be allowed. The case depends upon the true construction of the Act 24 & 25 Vict. c. 96. By the Act 21 Hen. 8, c. 11, it was provided that when goods had been stolen, and the felon had been convicted by reason of evidence given by the owner, the owner should be "restored to his goods," and in *Horwood* v. *Smith* (6) it was held that that provision applied though the stolen goods had been sold in market overt. The same thing had been previously stated by Lord Coke. (7) When goods are stolen, and the thief, or some one who has obtained possession of them from him, sells them in market overt, the common law rule as to sales in market overt being intended for the protection of the purchaser the effect of it is that his right at common law cannot be challenged. It has been argued that in such a case the property in the goods remains in the original owner. But the property in goods cannot be in two persons at once, and, as the absolute property is in the purchaser, the property must have passed from the original owner. If the goods were not sold in market overt the statute

(1) 10 C. B. 919.
(2) 4 Q. B. D. 32.
(3) 4 Q. B. D. 394, at p. 400.
(4) 17 Q. B. D. 598; ante, p. 314.
(5) 1 Q. B. D. 348.
(6) 2 T. R. 750.
(7) 2 Inst. 714.

was not wanted, for a thief has no property in stolen goods. The statute was only wanted in a case in which the goods had passed through an overt market. The legislature, in order to stimulate persons from whom goods had been stolen to prosecute the thief, intervened between the original owner and a purchaser in market overt, who, but for the enactment, would have had an absolute property in the goods. Having to choose between the two, the legislature thought that, for the general public benefit, they ought to prefer the original owner if he prosecuted the thief to conviction, but only in that case, and if he did so, "the property shall be restored to the owner, and the Court shall order the restitution of the property." Such an order can only be made against the person who has the goods in his possession at the time when it is made. But the making of such an order is left to the discretion of the Court, though the previous part of the section says that the property shall be restored. In *Horwood* v. *Smith* (1) it was held that the "property" meant the right to the goods. It evidently means that the property is to be restored as from the moment of the conviction. When goods have been sold in market overt the property in them has by the common law passed to the purchaser, and the statute says that, on the conviction of the thief, the property shall be restored to the original owner. It was of necessity held that it was only to be restored at the moment of the conviction. In the interval between the sale and the conviction of the thief the property was not in the original owner, and he cannot complain of anything which has been done with the goods in that interval. I do not think any one has attempted to overrule the construction which was put upon the statute of Hen. VIII. in *Horwood* v. *Smith* (1), and which was acted upon in *Scattergood* v. *Sylvester*. (2) The effect of the statutes 7 & 8 Geo. 4, c. 29, and 24 & 25 Vict. c. 96, is to bring in a new series of transactions, but they deal with those transactions in precisely the same words as the old statute dealt with goods which had been stolen and sold in market overt, and it must be inferred that it was intended to deal with the goods and to regulate the rights of the parties to them in the same way. The statute of Victoria deals with the case of goods obtained by false

(1) 2 T. R. 750. (2) 15 Q. B. 506.

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pretences. Goods may be obtained by false pretences in two ways: (1.) By what I may call bare false pretences. In that case the property in the goods does not pass, and the statute was not wanted. (2.) Goods may be obtained by false pretences, which lead to a contract of sale, in which case it has been held that the property in the goods passes to the purchaser. In such a case the contract of sale is voidable—not void, and, until it is avoided, it passes the property in the goods. And, however hard the result might be, the contract could not be avoided, as against anyone who had bought the goods innocently from the person who had deceived the original owner of them. It was only in the latter case, therefore, that the statute was wanted, and it is against that case only that the statute is aimed. That being so, if the statute had now to be construed for the first time, I should be clearly of opinion that it was intended to apply to a case in which the goods had passed away from the person who had committed the fraud into the hands of an innocent person. The statute was dealing with the case of two innocent persons, and it has dealt with it in the same manner as the case of stolen goods sold in market overt had been dealt with by the statute of Hen. VIII. Upon conviction of the thief the original owner has all the rights of an owner of the property in the goods, and he can recover them from the person in whose hands they then are. This view of the construction of the statute is in accordance with what was said by the judges in *Lindsay* v. *Cundy*. (1) Blackburn, J., after referring to the judgment of Buller, J., in *Horwood* v. *Smith* (2), said (3): "Altering the words very slightly, they would apply to the present case. When did the plaintiff's property begin, that is to say, begin after the time the defendants had got the goods, in this case? Not till after the conviction of the person guilty of the fraud, because before that time the property had been altered by a bonâ fide purchase from a person who held them under a voidable but not void contract. Altering these few words, everything in the judgment of Buller, J., is applicable to the present case." And further on he says, "And certainly, looking to the plain meaning of the words, 'if the guilty person

(1) 1 Q. B. D. 348.

(2) 2 T. R. 750.

(3) 1 Q. B. D. p. 357.

shall be convicted the property shall be restored,'—one would say it means, the property shall be restored from that time, not that it shall be considered to have been restored. The case of *Horwood* v. *Smith* (1) shews decidedly that the latter is not the meaning. And in the case of *Scattergood* v. *Sylvester* (2), though that was not the point before the Court, the Court used language which shews very strongly they had in their minds that the right to the stolen property was only from the conviction, and that then it was a fresh title that was given." Nothing can be plainer than that. And Lush, J., said (3), "It appears to me this case is precisely analogous to the case of *Horwood* v. *Smith*. (1) The difference between that case and the present is that there the goods had been stolen, but then they had been sold in market overt which passed the property, and the defendant in that case bought them in market overt, and therefore he acquired a good title; just as the defendants here acquired a good title by the bonâ fide purchase from the fraudulent buyer. The defendant in that case sold the goods again, and after that the thief was convicted. Then arose the question, whether the original owner of the goods could claim them against the defendant who had bought the goods in market overt, and sold them before conviction, and the Court held he could not." The Court there adopted the analogy of the earlier Act, and held that the later Act must have been intended to operate in the same manner, at the same moment, and against the same persons as the earlier Act.

No doubt *Moyce* v. *Newington* (4) presents a difficulty, because in it there was a considered judgment of the Queen's Bench Division. But it is in direct conflict with what was said in *Lindsay* v. *Cundy* (5), and it is clear that Cockburn, C.J., misapprehended what the judges there intended to say, as well as what was actually decided in *Horwood* v. *Smith*. (1) I do not see how *Moyce* v. *Newington* (4) is consistent with s. 100 of the Act 24 & 25 Vict. c. 96, reading the words of the section in their ordinary sense, and I am bound to express my opinion that it was wrongly decided. As to *Nickling* v. *Heaps* (6), the case as it is

(1) 2 T. R. 750.
(2) 15 Q. B. 506.
(3) 1 Q. B. D. p. 361.
(4) 4 Q. B. D. 32.
(5) 1 Q. B. D. 348.
(6) 21 L. T. (N.S.) 754.

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reported is wholly unintelligible to me. If it decided what it is supposed to have decided, I think the decision was wrong. But it is better not to cite an unintelligible case. In my opinion the plaintiff is entitled to recover the goods from the defendant, and the appeal must be allowed.

LINDLEY, L.J. It has been properly conceded that, but for s. 100 of the Act, the defendant would have had a valid title to the goods. The swindler who obtained them from the original owner acquired a voidable title to them, but before it had been avoided, the goods had been sold to the defendant, who acted bonâ fide in making the purchase. Then s. 100 comes in, and it says that on the conviction of the swindler, "the property shall be restored to the owner." I cannot doubt that by "the owner" is meant the person who was cheated, the person who was wronged. The property is to be restored. Who is to restore it? The Act does not say, but it can only be the person who has got the property. It seems to me that the construction which has been put on this Act and the two earlier Acts is right, and that the person who has got the goods at the time of the conviction is to restore them. This would be a hardship upon a bonâ fide purchaser for value, and therefore there are provisions in s. 100 for the protection of such purchasers in some cases, but those provisions are not applicable to the present case, and an express enactment that certain bonâ fide purchasers for value are to be protected affords no indication of an intention to protect others. A bonâ fide purchaser for value is not generally so much favoured at law as in equity, but such a purchaser in market overt is protected at law. It is old law that a bonâ fide purchaser of stolen goods in market overt must, on the conviction of the thief, if he then has the goods in his possession, restore them to the owner from whom they were stolen. It has also been decided that a bonâ fide purchaser for value from a person who has a voidable title stands for this purpose in the same position as a purchaser in market overt. In *Lindsay* v. *Cundy* (1) the purchaser of the goods had not got them in his possession when he was sued by the owner, he having sold them again, and that was the foundation of the decision in that case. With the exception of the two

(1) 1 Q. B. D. 348.

cases of *Moyce* v. *Newington* (1) and *Nickling* v. *Heaps* (2), I can find no difference in opinion as to the propriety of applying the Act to a bonâ fide purchaser who has the goods in his possession. *Moyce* v. *Newington* (1) is exactly on all fours with the present case, but I think the decision was founded upon a misapprehension of *Lindsay* v. *Cundy* (3) and *Horwood* v. *Smith* (4), and was wrong, though it does not purport to be opposed to the previous cases. *Nickling* v. *Heaps* (2) is so reported as to leave it very doubtful what the real ratio decidendi was. If the ground of the decision was that the property in the goods had never passed by the contract of sale it would be right, but it is not put on that ground. I decide the present case upon that which I conceive to be the true construction of the Act, as is shewn by *Horwood* v. *Smith* (4) and *Scattergood* v. *Sylvester*. (5)

LOPES, L.J. In my opinion *Horwood* v. *Smith* (4) and *Lindsay* v. *Cundy* (3) govern the present case, and I think they decide that, on the conviction of a person for felony or misdemeanor in the obtaining of goods, the property in the goods is by force of the statute restored to the original owner as against both a purchaser in market overt and a bonâ fide purchaser for value from a person who has a voidable title. But the restoration of the property is to date from the conviction, and it is to be restored only as against the person who has the goods at the time of the conviction, and it does not render a bonâ fide purchaser responsible for any dealing with the goods before the conviction. I cannot agree with the decision in *Moyce* v. *Newington*. (1) It appears to me that in that case *Horwood* v. *Smith* (4) and *Lindsay* v. *Cundy* (3) were either not sufficiently considered or misapprehended. As to *Nickling* v. *Heaps* (2) it may be my own fault, but I confess I do not understand it. I think the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Blunt & Lawford.*

Solicitors for defendant: *Phelps, Sidgwick, & Biddle.*

(1) 4 Q. B. D. 32.
(2) 21 L. T. (N.S.) 754.
(3) 1 Q. B. D. 348.
(4) 2 T. R. 750.
(5) 15 Q. B. 506.

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Dec. 14.

GOODMAN *v.* ROBINSON. BROWN, JANSON, & CO., GARNISHEES.

Practice—Attachment of Debts—Assignee of Judgment Debt—Garnishee Order—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6—*Order XLII.*, *rr.* 3, 32—*Order XLV.*, *r.* 1.

The assignee of a judgment debt is a person who has "obtained" a judgment within the meaning of Order XLV., r. 1, and is entitled to a garnishee order attaching debts due to the judgment debtor.

APPEAL from an order of Pollock, B., at Chambers. The plaintiff, having on June 5, 1884, obtained judgment against the defendant for 126*l.* 13*s.* 3*d.*, assigned his judgment on September 23, 1884, to one Hind, who obtained an order at chambers giving him leave to proceed to execution thereon. The garnishees, Brown, Janson, & Co., being indebted to the defendant, Hind subsequently obtained from Field, J., at chambers, a garnishee order nisi attaching all debts due from them to the defendant. On October 25, 1886, this order was discharged by Pollock, B. Hind appealed.

Dickens, for the appellant. The decision of the judge at chambers proceeded on the ground that the assignee was not a person who had "obtained" a judgment or order within the meaning of Order XLV., r. 1; but this rule must be taken subject to the provisions of the Judicature Act and the other rules, the effect of which is to put the assignee in the same position as his assignor, and to give him the same remedies for the enforcement of judgments. Under s. 25, sub-s. 6, of the Judicature Act, 1873, the assignee of a debt has the same remedies as the creditor himself; and it cannot be argued that the sub-section does not apply to judgment debts. If that is its effect, any person who is in a position to issue execution has a right to attach debts owing to the judgment debtor, attachment of debts being in the nature of an execution: *Baynard* v. *Simmons* (1); *Jones* v. *Jenner* (2); *Miller* v. *Mynn.* (3)

The respondents must therefore contend that the assignee of a judgment debt cannot issue execution.

(1) 5 E. & B. 59. (2) 25 L J. (Ex.) 319. (3) 1 E. & E. 1075.

By Order XLII., r. 32 (which in the rules of 1875 was the first rule of the order dealing with the attachment of debts), an application for the oral examination of the debtor may be made, not by the person who has "obtained" the judgment, but by the party "who is entitled to enforce" it. That rule was intended to lay the foundation for the attachment of debts under Order XLV., r. 1, by the person who has "obtained" a judgment; and the same person is obviously meant in each case. The question that arises on garnishee proceedings is whether the person seeking for a garnishee order is the person entitled to enforce the judgment; if that is so, under Order XLII., r. 32, he may have discovery in aid of execution; and if he is an assignee his remedy cannot stop there. Being within that rule, he must be within Order XLV., r. 1, which is in furtherance of it; and, therefore, in Order XLV., r. 1, the person "who has obtained" a judgment means the person who is entitled to enforce it.

It is apparent from Order XLII., r. 3, that the "legal and other remedies" which the creditor would have had under s. 25, sub-s. 6 of the Judicature Act, 1873, include execution of fieri facias, attachment of debts and sequestration; to take away the remedy by attachment from the assignee would be to interpolate in the section an exception of one of the then existing remedies. If the assignee has no right to an attachment, his remedy by execution necessarily goes also; and he would not be entitled to issue execution under rr. 10 and 19 of Order XLII., which confer that right on the person who "has obtained" the judgment. It is true that in *Ex parte Woodall* (1) and *Ex parte Blanchett* (2) it was held that the executrix of a judgment creditor and the assignee of a judgment debt respectively could not issue a bankruptcy notice against the judgment debtor; but in the former case the executrix had not obtained the necessary leave to issue execution on the judgment, while the latter case was decided, as is clear from the judgment of Bowen, L.J., on the ground that the Bankruptcy Act was penal, and that a liberal construction ought not to be given to a statute entailing penal consequences.

(1) 13 Q. B. D. 479. (2) 17 Q. B. D. 303.

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A. T. Lawrence, for the respondents. The appellant is not a person who has obtained a judgment within the meaning of Order XLV., r. 1. The language of the enactments relating to garnishee proceedings should be strictly construed: *Baynard* v. *Simmons* (1), per Lord Campbell, C.J. The assignee of a judgment debt cannot fulfil the conditions of Order XLV., r. 1, requiring the affidavit to be made by the person who has obtained the judgment or by his solicitor; and in this respect the position of the appellant is similar to that of a corporation under the rules of 1875 as laid down in *Bank of Montreal* v. *Cameron*. (2) It is not to be assumed that the entirely different language used in Order XLV., r. 1, means the same thing as that used in Order XLII., r. 32, and that the definite expression the person who has "obtained" a judgment is to be loosely construed as the person "entitled to enforce" it.

HUDDLESTON, B. The only question which arises before us is in substance whether an assignee of a judgment debt is entitled to avail himself of the garnishee procedure under the Judicature Act. Looking at the provisions of that statute, we see that by s. 25, sub-s. 6, power was for the first time given to an assignee to proceed upon the assignment without the consent of the assignor. For what purpose is this power given to him? In the language of the sub-section such assignments "shall be effectual in law to pass and transfer the legal right to such debt or chose in action, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." I pause here and ask, why is the assignee in this case to be deprived of the benefit given by this sub-section? I have heard no answer. He has the right and title to the debt and power to sue for its recovery, and all other legal rights and remedies; why not then the power of attachment? We must look at the whole tenor of the Act itself, and at the provisions and rules framed under it. Beginning with Order XLII., which was made in order to carry out the provisions of the Act, we see that it applies to remedy by execution; Order XLIII., to fieri facias, elegit, and sequestration; Order XLIV., to attachment, and

(1) 5 E. & B. 59. (2) 2 Q. B. D. 536.

Order XLV., to attachment of debts. What is the position under those orders of the assignee of a judgment debt? By Order XLII., r. 3, a judgment for the recovery of money may be enforced by any of the modes by which a judgment might have been enforced at the time of the passing of the Act. They undoubtedly included attachment of debts. Why is the assignee to be deprived of this power which is expressly given him by the Act and rules? By Order XLII., r. 10, if the person "who has obtained judgment" against a firm wants to issue execution against any other person as a member of the firm, he may apply to the Court for leave; the assignee of a judgment debt, being entitled to all the legal remedies for the recovery of the debt, therefore has power to make such an application. Is it not obvious that the assignee is in the position of a person to whom a sum of money is payable under a judgment within the meaning of Order XLII., r. 17, and who has the right to sue out a writ of fi. fa. or elegit? Further Order XLII., r. 19, allows a party who has "obtained judgment" in certain cases to issue execution in fourteen days; is not that a remedy which by virtue of the express words of s. 25, sub-s. 6, of the Judicature Act of 1873 is given to the assignee? Then comes the strong provision of Order XLII., r. 23, by which in certain specified cases the party "alleging himself to be entitled to execution" may apply for leave to issue "execution." But looking at Order XLII., r. 32, the meaning which is to be placed on the statutory enactment and on these various rules and orders becomes plain; and it could not be argued that the rule did not apply to the assignee of a judgment debt. What, then, is its meaning? Clearly that the person who is entitled to enforce a judgment (in this case the assignee) may obtain an order for the examination of the debtor before the judge with a view to the discovery of his property. And upon this follows Order XLV., r. 1, which says that upon the ex parte application of "any person who has obtained a judgment," all debts owing to the debtor may be attached. It was contended for the garnishees that the word "obtain" in this rule must be strictly construed as applicable only to the person who individually recovered judgment, and *Ex parte Blanchett* (1) was cited in support of this

(1) 17 Q. B. D. 303.

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contention; but that case was decided upon the words of a totally different Act of Parliament. Throughout the whole of the case the Judicature Act was never once referred to; there is, it is true, a reference to *Ex parte Woodall* (1), but the real meaning of that decision is explained by Bowen, L.J. *Ex parte Blanchett* (2) was wholly different to this case; it had reference to the construction of a penal statute, which is always rightly construed with strictness, while in the present case the rules have been made for the purpose of carrying out the provisions of s. 25, sub-s. 6 of the Judicature Act, by which new rights were given to assignees of debts.

MANISTY, J., concurred.

Appeal allowed.

Solicitors for appellant: *Spyer & Son.*
Solicitor for garnishees: *P. G. Robinson.*

W. J. B.

Dec. 14.

IN RE THE MUNICIPAL ELECTIONS ACT, 1884. EX PARTE ROBSON.

Municipal Corporation—Election of Councillors—Return of Expenses—Liability to make, although no Expenses actually incurred—Municipal Elections (Corrupt Practices) Act, 1884 (47 & 48 *Vict. c.* 70), *s.* 20, *s.* 21, *sub-ss.* 3, 5, 7.

The return of expenses and the accompanying declaration which, under the Municipal Elections Act, 1884, every candidate is required to send to the town clerk within twenty-eight days of the election of a town councillor must be sent although no expenses may have been actually incurred by the candidate in and about the election.

The Court will, upon satisfactory proof that the omission happened under such circumstances as to amount to an authorized excuse under the Act, make an order that the return and declaration be made by the candidate notwithstanding the lapse of the prescribed statutory period for making them.

APPLICATION for an order, under ss. 20 and 21 of the Municipal Elections Act, 1884, allowing an authorized excuse for the failure of the applicant to make the return and declaration required by that Act.

By s. 21, sub-s. 3, of the Municipal Elections Act, 1884 (47 & 48

(1) 13 Q. B. D. 479. (2) 17 Q. B. D. 303.

Vict. c. 70), "within twenty-eight days after the day of election of a town councillor every candidate at such elections shall send to the town clerk a return of all expenses incurred by such candidate or his agents on account of or in respect of the conduct or management of such election, ... accompanied by a declaration by the candidate made before a justice in the form set forth in the fourth schedule to this Act, or to the like effect."

By s. 21, sub-s. 4, "after the expiration of the time for making such return and declaration the candidate, if elected, shall not, until he has made the return and declaration . . . . or until the date of the allowance of such authorized excuse as is mentioned in this Act, sit or vote in the council, and if he does so shall forfeit fifty pounds for every day on which he so sits or votes to any person who sues for the same."

By s. 21, sub-s. 5, the omission, without an authorized excuse, to make such return and declaration is made an illegal practice.

By s. 20, "where it is shewn to the High Court . . . . that any act or omission of a candidate at a municipal election . . . . would, by reason of its being in contravention of any of the provisions of this Act, be but for this section an illegal practice . . . . and that such act or omission arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature . . . . the Court may make an order allowing such act or omission to be an exception from the provisions of this Act, which would otherwise make the same an illegal practice, ... and thereupon such candidate . . . . shall not be subject to any of the consequences under this Act of the said act or omission."

By s. 21, sub-s. 7, "If the candidate applies to the High Court, ... and shews that the failure to make the said return and declaration . . . . has arisen . . . . by reason of inadvertence, or of any reasonable cause of a like nature, ... the Court may . . . . make such order for allowing the authorized excuse for the failure to make such return and declaration . . . . as to the Court seems just."

At an election held in October, 1886, to supply a casual vacancy in the town council of the borough of Saffron Walden,

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the applicant and another person came forward as candidates; but his opponent having retired, the applicant was elected unopposed. He did not issue an address or appoint an agent, and he incurred no expenses whatever in and about the election. He did not within twenty-eight days of the election send in to the town clerk the return of expenses and declaration required to be made by s. 21, sub-s. 3, of the Act, being bonâ fide under the impression that it was unnecessary to do so where no expenses had been incurred. He now asked for an order relieving him from the consequences of his omission.

W. Graham, for the applicant. It is unnecessary to make the return and declaration where there have been no expenses. If it is necessary, the Court will follow the course adopted in *Re Speed* (unreported), and will order that the return and declaration be made now, notwithstanding the lapse of the statutory period for making them. There is no opposition to the application.

HUDDLESTON, B. I think that we may accede to this application, but it must be upon terms. The Act provides, in s. 21, sub-s. 3, that a return of the expenses must be made by the candidate within twenty-eight days after the day of election, and must be accompanied by a declaration in the form in the schedule to the Act. When we look at the schedule, it is clear that the declaration which is required to be made must not only say that the candidate has paid the amount named in the return, but it must negative the expenditure of any other moneys on his behalf, and it must further declare that no future payments, &c., will be made in respect of that election. It is true that in the present case the applicant has not incurred any expenses at all, and it seems at first sight difficult to make out a return of expenses under such circumstances; but the Act requires a declaration of a very sweeping character to be made, and it is clear that the declaration and the account of expenses are different things. Possibly they might both be embodied in one document; but a candidate must at any rate make the prescribed statutory declaration that no expenses have been incurred. Here nothing has been done; but we are told that the omission arose from inad-

vertence; we may, therefore, fairly give the relief asked; but as the meaning of the statute is very clear, the requisite declaration must be made by the applicant within three days. It is clear to us that we have the power to give the relief asked for in this application, and, following the course adopted in the case of *In re Speed* (unreported), we allow the excuse, and order that the return and declaration be made.

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MANISTY, J., concurred.

Application allowed.

Solicitors for applicant: *Aldridge, Thorn, & Robinson.*

W. J. B.

[IN THE COURT OF APPEAL.]

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IN THE MATTER OF AN ARBITRATION UNDER THE COAL MINES REGULATION ACT, 1872, BETWEEN HER MAJESTY'S SECRETARY OF STATE FOR THE HOME DEPARTMENT AND HERBERT FLETCHER.

Mine—Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 46—*Notice by Inspector of Causes of Danger—Objection of Owner to remedy Matter complained of—Determination of Matter by Arbitration—Powers of Arbitrator.*

In an arbitration under s. 46 of the Coal Mines Regulation Act, 1872, the duty of the arbitrator is limited to determining whether the matter complained of by the inspector is dangerous and ought to be remedied, and he has no power to determine what is the proper remedy, or to direct that any particular remedy be adopted.

THIS was an appeal from a judgment of Denman and Hawkins, JJ., dismissing an application to set aside an award, or to remit it to the umpire.

The award was made under s. 46 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), under the following circumstances:—

In April, 1886, notice was given under the Act by the inspector of mines for the district, to H. Fletcher, owner of the Ladyshore Colliery, Little Lever, near Bolton, that certain mines in the colliery, including the Gingham mine, were worked with open and not safety lamps, notwithstanding that such mines were subject to emissions of fire-damp; and that the inspector was of

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opinion that, having regard to the character of the mine, the said matter was dangerous or defective so as to threaten or tend to the bodily injury of the persons employed in and about the said colliery, and requiring the said H. Fletcher forthwith to remedy the same matter.

The mine-owner objected to comply with this notice, and in the notice of objection served on the inspector stated the grounds of the objection to be that owing to various circumstances connected with the mine he was convinced that the lighting of these mines by open lights was attended by less danger and loss of life to the workmen employed than would follow the exclusive use of any of the safety lamps then before the public. Thereupon the Home Secretary and the mine-owner each appointed an arbitrator, who appointed an umpire, to decide the points in the reference.

The umpire made his award, the material part of which was as follows: "I award and determine that the said Herbert Fletcher shall work or cause to be worked the mine called the Gingham mine of the said Ladyshore Colliery with safety lamps, and shall cease to work the same with open lights as heretofore." Like directions were given as to the other mines.

Sect. 46 of the Coal Mines Regulation Act, 1872, enacts: "If in any respect (which is not provided against by any express provision of this Act or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice in or connected with any such mine to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine, or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied; and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State.

"If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice he may, within twenty days after the receipt of such notice, send his objection in writing, stating the grounds thereof, to a Secretary of State; and

thereupon the matter shall be determined by arbitration in manner provided by this Act; and the date of the receipt of such objection shall be deemed to be the date of the reference. If the owner, agent, or manager fail to comply either with the requisition of the notice, where no objection is sent within the time aforesaid, or with the award made on arbitration, within twenty days after the expiration of the time for objection or the time of making of the award (as the case may be), he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence:

"Provided that the Court, if satisfied that the owner, agent, or manager, has taken active measures for complying with the notice or award, but has not, with reasonable diligence, been able to complete the works, may adjourn any proceedings taken before them for punishing such offence, and, if the works are completed within a reasonable time, no penalty shall be inflicted."

Fletcher being dissatisfied with the award, moved in the Queen's Bench Division to set it aside, or remit it to the umpire. This motion being refused, he appealed.

Jan. 15. *Henn Collins, Q.C.*, and *C. A. Russell*, for the appellant. The grounds of objection to the award are, that the umpire had no jurisdiction to deal with the matter in difference, and that if he had he has exceeded his jurisdiction. Sect. 51 of the Act contains general rules which are applicable to the state of things in this mine. Sub-sect. 2 deals with the case of a mine in which inflammable gas is found, sub-s. 6 with the withdrawal of workmen in case of danger, and sub-s. 7 with safety lamps and lights. The matter is also dealt with by the special rules of the mine. (1)

(1) The following special rules for the mine were cited: "That the manager will order when requisite locked safety lamps to be used, and will appoint a competent person to examine them. The underlooker, fireman, or other competent person appointed for the purpose, shall in other respects attend to this rule, and shall also order safety lamps to be temporarily used whenever he may think it requisite. No person shall have in his possession in the mine a key or contrivance for opening the lock of any safety lamp, except the manager. Where naked lights are used, and he is provided with a safety lamp, he shall at the beginning of a shift, and also after intermission of working, try his place with a lamp, and not with a naked light, to see if there be firedamp."

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Consequently the provisions of s. 46 are not applicable. But even if they are, there is no power in the inspector or the umpire to point out what is to be done, and the umpire in doing so has exceeded his powers, and the award is bad.

Sir R. E. Webster, A.G., and *R. S. Wright*, contrà. The question here is whether the use of open lights is or is not safe. The general or special rules cannot affect this question, though they may apply when it is determined. Further, the umpire has not exceeded his powers by stating that the only alternative to open lamps, namely safety lamps, shall be adopted. At all events he has determined the question that the working of the mine with open lamps is dangerous, and his award ought not to be set aside, even if it goes in other respects beyond the scope of his authority.

C. A. Russell, in reply.

Cur. adv. vult.

Jan. 17. LORD ESHER, M.R. In this case three points were taken, two of which are of considerable importance. The inspector of mines for the district having inspected the appellant's mine, came to the conclusion that the use of open lamps in the mine was a source of danger, and acting, as he stated, under the Coal Mines Regulation Act, 1872, he made a requisition on the mine owner to remedy that matter. The mine-owner has a strong opinion that the use of open lamps is more safe under the particular circumstances of the case than the use of safety lamps. He therefore objected to comply with the notice, and the matter went before an umpire, who has given a decision agreeing with the inspector. He has made his award, and two objections are taken to it—first, that he had no jurisdiction in the matter, and, secondly, that if he had any jurisdiction, he has acted in excess of it. There was a third objection: that the umpire was not properly appointed, but that was abandoned. It is contended that the matter dealt with in the award is already provided for by the general rules in the Act and also by the special rules, and is therefore outside the provisions of s. 46 of the Act, so that no arbitration could take place under that section. I think, however, that neither the general rules contained in the 6th and 7th

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sub-sections of s. 51, nor the special rules to which we have been referred, are applicable to this case. The necessity for withdrawing workmen from a dangerous mine, and the regulations as to safety lamps, where they are used, are wide of the question in the present case, which is whether it is necessary for the safety of the workmen to stop the use of open lamps.

The opinion I have come to on the second point does not make the Act so preservative of the safety of the workmen as I could have wished, but that does not affect the construction I feel bound to put on the words of the statute. We have to follow the general rule of construction, and put on the words used their ordinary meaning, and see to what conclusion that leads. Now, going through the 46th section, we find, first of all, that the inspector has to see whether any mine or part of a mine, or any matter, thing, or practice in or connected with such mine, is dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person. Then he is to give a notice, and state, not merely that the mine or practice is dangerous, but the particulars in which he considers it is so, and to require the same to be remedied. Where does his duty stop? At requiring the matter to be remedied. He is not told to say what he thinks to be the remedy, nor to require that remedy to be carried out. When the complaint is brought to the notice of the owner, agent, or manager, if he objects, not to a remedy proposed, but to remedy the matter complained of, he is to send an objection in writing stating his grounds to a secretary of state, and thereupon the matter shall be determined by arbitration. What is the matter to be determined by arbitration? The inspector has required a matter or practice to be remedied, the owner has stated his grounds for objecting to remedy the matter complained of, and the requisition of the inspector and the objection to it of the owner are the matter which is to be determined by arbitration—that is, the question is whether the requisition of the inspector is one to which the objections of the owner form a sufficient answer. That is all that is to be determined. There being no words which enable the inspector to name a remedy, the arbitrator has no question of a remedy before him. If the arbitrator finds that the objections of the mine-owner are unfounded, the

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requisition of the inspector stands. If after that the mine-owner does not remedy the matter complained of, he must take the consequences, but the arbitrator has nothing to do with the consequences of the mine-owner's neglect, that is for another tribunal. Applying these principles, I think the award goes beyond what I have stated to be the power of the arbitrator. The award should have followed the requisition of the inspector, and pronounced that the matter—that is, the working the mines with open lamps—was dangerous or defective, so as to threaten or tend to the bodily injury of the persons employed in and about the said colliery. But the arbitrator has determined that the mines are to be worked with safety lamps—that is, he has determined what is the remedy which should be adopted, and directed that to be followed. He has substantially found that the complaint is well founded, though he has gone beyond his powers in other respects. I can see no reason, therefore, why the award should not go back to him, so that he may put it into form. When that is done, it will be for the mine owner to remedy the defect, for if he does not he will, if the opinion of the next tribunal is against him, be liable to penalties under the Act.

BOWEN, L.J. There are two points in this case to which I will address myself—whether the arbitrator had jurisdiction, and whether the award is in proper form? As to the first question, it seems to me that none of the general or special rules apply to the matter which is in dispute in this case, which is therefore a proper matter for arbitration. As to the other point, there is no more familiar rule than that an arbitrator ought in his award to follow the submission, and only determine what is submitted to him. If he is to find out what should be done in the particular case, a direction to that effect would be found in the submission, if to say what is to be done generally, that also would be found in the submission. Applying this, the power given to the arbitrator is limited to determining the matter in difference which has arisen under the 46th section. The inspector must first of all have come to the conclusion that the mine, or part of a mine, or any matter, thing, or practice in or connected with the mine is dangerous or defective so as in his opinion to threaten or tend to the bodily

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injury of any person; next he is to give notice in writing of his opinion, and is to state the particulars in which he considers the mine, part of a mine, matter, thing, or practice is dangerous or defective, and lastly he must require the same (that is the thing of which he is complaining) to be remedied. In the present case the matter required to be remedied is the working of the mine with open lamps, the mine-owner sent in his objections, and thus the matter was ripe for arbitration. The umpire had to determine whether the matter complained of was dangerous, and whether the requisition for a remedy was proper, in other words, whether the matter was so dangerous as to require a remedy. The umpire ought to confine himself strictly to the authority given him, and that does not include any power to determine what is the right remedy or to order that it shall be adopted. His award is, therefore, in my opinion, wrong in form, but as the arbitrator has in fact determined the matter submitted to him I do not think we ought to set aside the award, but it ought to be remitted. I do not mean to suggest that there can be any other remedy for the matter complained of than to leave it off. It is sufficient for the present purpose to say that the award is wrong in form, and must be sent back to the umpire.

FRY, L.J. The two questions to be decided both arise under s. 46. The first inquiry is whether the matter dealt with by the requisition and notice is provided for by any general or special rule. The requisition relates to the habitual use of open lamps, and this is declared dangerous. It seems to me clear that this is not a matter dealt with in the Act or in the special rules, and if that is so it was within the jurisdiction of the inspector. The thing to be remedied is the practice which the inspector has found to be dangerous, and the Act deals with objections by the owner to remedy, not the danger, but the matter complained of. Whether the matter complained of ought to be remedied is therefore the question about which a dispute arises, and that is the dispute which the arbitrator has to determine, and he has not to deal with anything further. I think the award ought to follow the requisition, and to state that the danger exists, and ought to be remedied, because that is the subject-matter of the

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dispute, but it is beyond the competence of the arbitrator to direct what is to be done to remedy the danger. Inasmuch however as the true matter in dispute was whether the requisition of the inspector was right, and that has clearly been determined by the umpire, I think the award ought to go back to him to be dealt with.

Award remitted to arbitrator.

Solicitors for Secretary of State: *Hare & Co.*

Solicitors for Fletcher: *Chester, Mayhew, Broome, & Griffithes, for H. M. Richardson, Bolton.*

A. M.

Jan. 18.

[IN THE COURT OF APPEAL.]

BERRIDGE *v.* THE MAN ON INSURANCE COMPANY, LIMITED.

Insurance, Marine—Policy on Advances on Ship—"Full interest admitted"—19 Geo. 2, c. 37, s. 1.

A policy insuring cash advances on a ship is within 19 Geo. 2, c. 37, s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute.

Smith v. *Reynolds* (1 H. & N. 221; 25 L. J. (Ex.) 337) and *De Mattos* v. *North* (Law Rep. 3 Ex. 185) followed.

APPEAL from the judgment of Pollock, B.

The action was upon a policy of marine insurance made by the defendants, a joint stock company registered in England. The defendants pleaded that the policy sued on was void as contravening the provisions of 19 Geo. 2, c. 37.

The facts were as follows:—

The plaintiff having advanced money on the security of a ship called the *Gainsford* insured such advances with the defendants. The policy, which was partly in print and partly in writing, stated that the insurance was upon goods and merchandizes, upon the ship *Gainsford* for a certain voyage specified, and that "the said goods and merchandizes, for so much as concerns the assured, are and shall be 1250*l.* on cash advances:" and in the margin were the words "full interest admitted." It was not

disputed that the plaintiff had made the advances, and was interested in the ship to the extent of such advances.

The learned judge gave judgment for the defendants on the ground that the policy was avoided by the above-mentioned statute. (1)

Finlay, Q.C., and *Hollams*, for the plaintiff. The reasonable construction of the words in the margin is not that the policy shall be sufficient proof of interest, but that, if an interest be proved, the policy shall be conclusive as to the quantum of such interest. The scope of these words is really merely to make it a valued policy on advances. This is clearly not a wagering policy because the plaintiff was interested.

Secondly, the case is not within the statute, because it is not a case of insurance on ship or goods, but on advances.

[They cited *Smith* v. *Reynolds* (2); *De Mattos* v. *North* (3); *Allkins* v. *Jupe*. (4)]

Myburgh, Q.C., and *English Harrison*, for the defendants, were not called upon.

LORD ESHER, M.R. The first question is, whether this policy is within the statute. The cases of *Smith* v. *Reynolds* (2), *De Mattos* v. *North* (3), and *Allkins* v. *Jupe* (4) shew that for this purpose the thing on which the assurance is made is the thing physically at risk from the perils insured against, the loss of which involves the loss of the subject-matter of the insurance, that is to say, in this case, the ship. The plaintiff, being interested in the ship to the extent of his advances, effects an insurance on the ship within the meaning of the statute in respect of such advances. It was suggested for the plaintiff that this Court could overrule

(1) The 19 Geo. 2, c. 37, s. 1, provides that "no assurance shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such insurance shall be null and void to all intents and purposes."

(2) 1 H. & N. 221; 25 L. J. (Ex.) 337.

(3) Law Rep. 3 Ex. 185.

(4) 2 C. P. D. 375.

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those decisions. If we were not prepared to acquiesce in the reasoning on which they are based, I do not think we ought to overrule them now, but I think that the decisions were right. Then the remaining question is, whether this policy contravenes the Act by reason of its being a policy which is to take effect "without further proof of interest than the policy." The words "full interest admitted" do not seem to me to amount merely to a statement that the interest shall, if it exists, be valued at a certain sum, but to imply that no proof of interest shall be requisite. I cannot imagine words which without being identical with the words of the statute could more exactly convey the same meaning. This is not a gaming or wagering policy, but I think it is nevertheless vitiated by reason of the words of the statute which forbid insurances "without further proof of interest than the policy." This appeal must, therefore, be dismissed.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendants: *Harwood & Stephenson.*

E. L.

[IN THE COURT OF APPEAL.]

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Nov. 29;
Dec. 7, 8.

THE QUEEN *v.* THE MAYOR AND CORPORATION OF THE BOROUGH OF BANGOR.

Municipal Corporation—Election of Councillor—Disqualification—Alderman—Returning Officer—Declaration of Election, Effect of—Public Notice to Electors—Mandamus—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 2, *Sched. I., rr.* 45, 46—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 35, 58.

At an election for the office of a councillor of one of the wards of a borough, R. and P. were the only candidates. At the close of the poll P. objected that R. was disqualified for election by reason of his being an alderman of the borough whose term of office had not expired, and P. claimed himself to be elected whatever might be the result of the poll. The returning officer counted the votes, and then stated to those present the number given to each candidate, the result of the poll being that R. had a majority. Having taken time to consider the objection, the returning officer on the following day issued a public notice stating the number of votes given to each candidate, and the objection, and declaring that P. was duly elected. P. thereupon made and subscribed the declaration of acceptance of the office required by s. 35 of the Municipal Corporations Act, 1882, and attended meetings of the council. R. subsequently made and subscribed a similar declaration and attended meetings of the council:—

Held (reversing the decision of the Queen's Bench Division, making absolute a rule for a mandamus to compel the mayor and corporation of the borough to receive P.'s votes at their corporate meetings); (1) that R. was not by reason of his being an alderman disqualified for election to the office of councillor, and that by accepting the latter office he vacated the former; (2) that the returning officer had no power to decide whether R. was disqualified or not; (3) that by stating at the close of the poll the number of votes given to each candidate the returning officer had made a sufficient declaration under s. 2 of the Ballot Act, 1872, that R. was elected, and that the effect of that declaration was not altered by reason of the public notice issued on the following day under rr. 45 and 46 of the rules in the first schedule to that Act; and (4), that the office councillor was not de facto filled by P. so as to entitle him to hold it until dispossessed by an election petition or by quo warranto.

RULE for a mandamus to the mayor and corporation of the borough of Bangor commanding them to receive and count the vote of one John Pritchard at the corporate meetings of the council.

The affidavits upon which the rule was obtained stated the following material facts:—

On the 23rd of October, 1886, John Pritchard and Meshack

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Roberts were nominated as candidates for the office of councillor for the South Ward of the borough of Bangor. Roberts was at the time of such nomination, and continued until the 9th of November following, an alderman for the borough.

On the 25th of October the mayor of the borough attended at the council chamber to decide on the validity of any objection that might be made to the nomination papers, and Pritchard then attended and personally objected in writing that the nomination of Roberts was void on the ground that, as an alderman whose term of office had not expired, he was ineligible for election to the council. The mayor overruled that objection. The election was held on the 2nd of November, and after the polling was completed the ballot boxes were taken to the Masonic Hall in the borough, and the votes were there counted by the returning officer of the South Ward. Both before the commencement of the counting, and during its progress, Pritchard objected to the returning officer that Roberts, being an alderman of the borough whose term of office did not expire until the 9th of November, was disqualified from being elected as councillor; and Pritchard claimed himself to be elected whatever the result of the poll might be.

When the votes had been counted it was found that Roberts had obtained 171 votes, and Pritchard 151, giving Roberts a majority of twenty votes. The returning officer stated the number of votes given to each candidate to the mayor, and then went away, being desirous of considering what course he should take with respect to the objection which Pritchard had raised.

The mayor then went to the steps outside the building and announced the number of the votes given to each candidate.

On the 3rd of November the returning officer, having considered the objections raised by Pritchard, and having taken legal advice, came to the conclusion that Roberts, by reason of his being an alderman of the borough, was disqualified from being elected a councillor. On the same day the returning officer issued a placard as a public notice, in which, after stating the number of votes given to each candidate, and that Pritchard had claimed to be elected on the ground that Roberts was an alderman of the borough, the returning officer stated that he held

Pritchard's claim to be well founded, and declared that Pritchard was duly elected as councillor for the South Ward.

On the same day, after the publication of the above notice, the town clerk of the borough sent Pritchard a notice informing him that he had been elected, and stating the time and place at which he might make the declaration required by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 35; and on the same day Pritchard attended at the town clerk's office, and made and subscribed the declaration accordingly. On the 9th of November Pritchard attended a meeting of the council when the mayor refused to receive and count his vote in respect of questions then pending. On the same occasion Roberts made and subscribed the declaration required by the Municipal Corporations Act, 1882, and voted at the meeting.

Pritchard having obtained a rule nisi for a peremptory mandamus,

R. S. Wright, for the corporation, on the 29th of November, 1886, shewed cause. This proceeding is misconceived, the office is full, no mandamus can issue; the remedy, if any, is by quo warranto: *Frost* v. *Mayor of Chester*. (1) Pritchard cannot be held to have been elected unless the votes given to Roberts must be considered to have been thrown away; but the electors had no such notice of the disqualification of Roberts as to cause the votes given for him to be thrown away: *Reg.* v. *Tewkesbury*. (2) It was no doubt assumed in *Reg.* v. *Coaks* (3) that an alderman is ineligible as a councillor, but the point was not argued, and it is not clear that the alderman in that case was, as here, a retiring alderman. Roberts was not ineligible, and his acceptance of the second office would vacate the office of alderman.

[He cited also *Reg.* v. *Ledgard* (4), and *Reg.* v. *Leeds*. (5)]

Willis, Q.C., and *Marshall*, for Roberts, did not argue.

Sir H. James, Q.C., *McIntyre, Q.C.*, and *M. Douglas*, for the relator. The mayor was not the returning officer for this ward, for Platt was the alderman assigned for that purpose under 45 & 46 Vict.

(1) 5 E. & B. 531; 25 L. J. (Q.B.) 61.
(2) Law Rep. 3 Q. B. 629.
(3) 3 E. & B. 249.
(4) 8 Ad. & E. 535.
(5) 11 Ad. & E. 512.

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c. 50, s. 53. The duty of the mayor is defined and limited by schedule III., part 2, rule 9 of that Act: *Howes* v. *Turner*. (1) The duty of the returning officer has to be gathered from those provisions of 35 & 36 Vict. c. 33, which are applicable to municipal elections. By s. 20, sub-s. 5, of that Act, no return is in the case of a municipal election to be made to the clerk of the Crown, that provision in 35 & 36 Vict. c. 33, s. 2, therefore is not applicable to a municipal election. That section and rr. 45 and 46 in the first schedule to the Act point out the duties of the returning officer, and in this case the returning officer has given public notice, pursuant to those rules, that Pritchard has been elected. The mayor cannot set aside that notice, and if it is desired to question the return it must be done by petition, for the mayor not being the returning officer, and having no duties with regard to the declaration, could not make any declaration within 35 & 36 Vict. c. 33. The returning officer, whose duties are not merely ministerial, *Reg.* v. *Owens* (2), has made the proper declaration, Pritchard is in office, the office is full, and the mandamus can issue in the terms of the rule.

[DENMAN, J. Sect. 2 of 35 & 36 Vict. c. 33, says that the returning officer shall "forthwith declare" who has been elected. Has this been done?]

No; but rule 45 says he shall "as soon as possible" give public notice of the election, and even if the statute is not on this point merely directory, a disregard of its provisions in this respect would not invalidate the election, but even if it would, still the question must be raised in the proper way by petition.

Roberts being an alderman was ineligible, as was decided in *Reg.* v. *Coaks*. (3) Pritchard was the first to qualify, and he having been declared elected by the returning officer, having received notice from the town clerk that he had been returned, and having qualified, is rightly in possession of the office.

[They referred to 45 & 46 Vict. c. 50, s. 87, and *Reg.* v. *Winchester*. (4)]

(1) 1 C. P. D. 670.
(2) 2 E. & E. 86.
(3) 3 E. & B. 249.
(4) 7 Ad. & E. 215.

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DENMAN, J. I am of opinion that this rule should be made absolute, though I do not think the matter is free from doubt.

It appears that Roberts was an alderman of the borough of Bangor at the beginning of November, and I am of opinion that we must follow the case of *Reg.* v. *Coaks* (1) and hold that he was therefore ineligible as a councillor.

The election of councillors must be held according to the provisions of the Municipal Corporation Act, 1882, and the Ballot Act, 1872 (35 & 36 Vict. c. 33). The Ballot Act appears to me to bear most directly on the present question, and I will first consider the third paragraph of s. 2, which is as follows:—

"After the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given."

Having regard to these provisions I am unable to come to the conclusion that the facts of the case establish that a proper declaration of the election of Roberts was "forthwith" made on the 2nd of November. A question had been raised as to the qualification of Roberts, and the returning officer having that difficulty in his mind counted the votes. He then ascertained that Roberts had a majority, and then, as it seems to me, he did deliberately and purposely refrain from doing on that day that which the Act directs him to do. He ought to "forthwith declare to be elected" one of the candidates. But the mayor asked him to make a declaration and he declined to do so, he retained the paper, saying, "I will tell you the numbers," so that there was at that time no declaration at all. The question, therefore, arises as to the effect in law of what he did afterwards, for on the 2nd of November he, considering that Roberts was ineligible and that his candidature must be disregarded, had a placard prepared declaring Pritchard to be elected, and that placard was published on the 3rd of November. It may be a question whether this was a proper

(1) 3 E. & B. 249.

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declaration of the election of Pritchard within the meaning of 35 & 36 Vict. c. 33, s. 2, and whether, as the word "forthwith" is placed in that section, a returning officer has the power, if he is in doubt, to take time to consult and take advice before declaring who is elected. But at all events there was no declaration that Roberts was elected such as satisfies the statute, and the returning officer has made, though not forthwith, a declaration that Pritchard was elected. This being so, Pritchard first took the steps necessary to complete his qualification to act as a councillor and there is no petition against his return; but yet the mayor denies his right to vote in the council and selects Roberts instead. The mayor in fact exceeded his duty in announcing that Roberts had received a majority of votes and treating that as a declaration in opposition to the declaration of the returning officer that Pritchard had been elected. The declaration by the mayor on the steps was unauthorized and invalid, for the returning officer distinctly declined at that time to make a declaration, and the mayor cannot perform the duty of the returning officer for him in that way, for he is not the person on whom the duty of making the declaration is imposed by the Act or by the rules appended to the Act, as may be seen on referring to rules 45 and 46 in the schedule.

I think that there is an inconvenience in giving the returning officer the locus pœnitentiæ which is claimed for him under the words "as soon as possible" in rule 45. The statute says "forthwith," but it does not say that he may not have some time in which to make up his mind, and it is clear that he can recount the votes if he thinks there is an error, or that he can, as is sometimes done in parliamentary elections, adjourn the counting to the following morning.

I think that as an appeal lies in this case it is not necessary to order the prosecutor to declare in mandamus, but that we may give judgment making the rule absolute for a peremptory mandamus.

STEPHEN, J., concurred.

Rule absolute.

R B. R.

Leave was obtained on behalf of the corporation from the Court of Appeal to serve short notice of appeal against the order of the Queen's Bench Division, but the corporation subsequently, having received the mandamus, held a meeting, and by a majority of one vote (Pritchard being present and voting with the majority) decided to obey it. Roberts thereupon obtained leave to prosecute the appeal on his own behalf.

1886. Dec. 8. *Sir C. Russell, Q.C.*, and *R. S. Wright* (*Marchant Williams* with them), for the appellant, Roberts. This mandamus ought not to have been granted. Roberts was eligible to be elected a councillor. The disqualifications are set out in s. 12 of the Municipal Corporations Act, 1882, but the suggested disqualification is not mentioned there. If, therefore, it exists at all, it must exist because the two offices are incompatible. But if they are, the assumption of the second office vacates the first: *Rex* v. *Trelawney* (1); *Rex* v. *Godwin* (2); *Milward* v. *Thatcher* (3); *R.* v. *Hughes* (4); *R.* v. *Tissard* (5); *R.* v. *Day* (6); *Staniland* v. *Hopkins.* (7) The Court below appears to have acted upon the authority of *Reg.* v. *Coaks* (8); but that case does not apply, because the learned judges assumed, as the special verdict found, that an alderman was ineligible for election as a councillor, and the point was not argued.

Secondly, assuming that Roberts was ineligible, the returning officer could not determine the question. In order to enable votes given for a candidate who is disqualified to be treated as thrown away, the disqualification must be so notorious as to amount to notice to the electors that no valid vote can be given for him: *Gosling* v. *Veley* (9); *Reg.* v. *Mayor of Tewkesbury* (10); *Drinkwater* v. *Deakin* (11); *Reg.* v. *Hiorns.* (12) Here the disqualification was a fair matter for argument.

Thirdly, Roberts was in fact duly elected. The declaration by

(1) 3 Burr. 1616.
(2) 1 Doug. 397.
(3) 2 T. R. 81.
(4) 5 B. & C. 886, per Bayley, J., at p. 892.
(5) 9 B. & C. 418.
(6) 9 B. & C. 702.
(7) 9 M. & W. 178.
(8) 3 E. & B. 249.
(9) 7 Q. B. 406, per Lord Denman, C.J., at p. 437.
(10) Law Rep. 3 Q. B. 629.
(11) Law Rep. 9 C. P. 626.
(12) 7 Ad. & E. 960.

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the returning officer of the numbers was a sufficient declaration under the statute. His duties are defined by the Ballot Act, 1872, s. 2, and rr. 45 & 46 of the rules made under that Act. (1) Upon the true construction of the section and rules it is clear that the declaration which the returning officer is to make is a declaration of the result of the poll which he has ascertained by counting the votes. The public notification of that result is a matter subsequent to the declaration and cannot be an essential part of the election; and further, that public notification is not to be made to the same persons as is the declaration.

(1) By s. 58 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), if an election of councillors is contested the poll shall, as far as circumstances admit, be conducted as the poll at a contested parliamentary election is by the Ballot Act, 1872, directed to be conducted; and subject to the modifications expressed in Part III. of the Third Schedule and to the other provisions of this Act, the provisions of the Ballot Act, 1872, relating to a poll at a parliamentary election (including the provisions relating to the duties of the returning officer after the close of the poll) shall apply to a poll at an election of councillors.

Sect. 2 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), provides that in the case of a poll at an election the votes shall be given by ballot, and prescribes the mode of voting. The section further provides that, "after the close of the poll the ballot boxes shall be sealed up so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of the votes have been given, and return their names to the Clerk of the Crown in Chancery. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return."

By r. 45 of the rules in the first schedule to the Ballot Act, 1872, "the returning officer shall, as soon as possible, give public notice of the names of the candidates elected, and, in the case of a contested election, of the total number of votes given for each candidate, whether elected or not."

Rule 46: "Where the returning officer is required or authorized by this Act to give any public notice, he shall carry such requirement into effect by advertisements, placards, handbills, or such other means as he thinks best calculated to afford information to the electors."

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 53, at an election of councillors for a whole borough the returning officer shall be the mayor; but at an election for a ward the returning officer (except with respect to the first election held after the borough has been divided into wards) shall be an alderman assigned for that purpose by the council.

Fourthly, if Roberts was not duly elected, the respondent should have proceeded by way of election petition or quo warranto. At all events, this is not a case in which the Court below should have granted a peremptory mandamus, but the appellant should have been allowed to argue the question upon a return to the writ.

Alexander Glen, for the mayor and corporation of Bangor, did not argue.

Sir Henry James, Q.C., *McIntyre, Q.C.* (*M. Douglas* with them), for the respondent. The appellant, being an alderman, was disqualified from election to the council. The earlier cases cited for the appellant, which were decided before the passing of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), do not apply here. Those cases only decide that, by accepting an office incompatible with the one he already holds, a person thereby vacates his former office. Before the present case it has never been suggested that an alderman could be elected to the council. In *Reg.* v. *Coaks* (1) there were dicta of the learned judges directly to the contrary. The point was not taken by the eminent counsel who argued that case for the Crown, because it was assumed to be unarguable since the passing of the Act of 1835. The intention of the Municipal Corporations Acts is to provide an efficient governing body for the borough. If a man can be both alderman and councillor, the constituency is thereby deprived of one of its members. If the office of alderman is vacated by reason of the election to the council, the effect is to allow the person elected to escape from performing the duties of an alderman, which duties he is by statute bound to perform under a penalty. By s. 34 of the Municipal Corporations Act, 1882, every qualified person elected to a corporate office shall accept the office by making the prescribed declaration, or shall be liable to pay to the council a fine not exceeding 50*l.*, and by s. 36 he is made liable to pay the same fine if at any time he resigns a corporate office to which he has been elected. Similar provisions were contained in s. 51 of the Act of 1835. The legislature cannot have intended that an alderman should be eligible for election to the council when the effect would be to render him liable to the fine either for resigning

(1) 3 E. & B. 249.

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the office of alderman or for not accepting the office of councillor. The appellant's address when he sought to be elected a councillor, was signed and issued as alderman. There was, therefore, sufficient notice to the electors of his ineligibility, and the votes given for him were thrown away. In such a case it is the duty of the returning officer to act upon the disqualification of any person nominated for election where that disqualification is clearly made out. Suppose a woman, or an infant, or a person who had died before the election took place, had been nominated, could it be contended that the returning officer was bound to declare a person under any of those incapacities duly elected? At common law the duties of a returning officer were not merely ministerial; he was a judicial officer entrusted with the decision of difficult questions: *Reg.* v. *Owens.* (1) Though deprived of some of his powers in that respect by statute, he is still left a judicial officer. In the present case he decided that the respondent was duly elected, and made the public declaration required by rule 45 to that effect. The fact that he announced the numbers directly after the poll had no effect upon the election, nor had anything that the mayor did at that time. The public declaration by the returning officer of the person elected is a necessary part of the election. When the returning officer made that declaration by issuing his placards on the day after the election, the respondent became the person duly elected, and when he accepted the office, and qualified by making and subscribing the declaration prescribed by s. 35 of the Act of 1882, the office was filled by him; and even though the decision of the returning officer were wrong, the respondent, being de facto in the office, could not be ousted from it except upon an election petition or by quo warranto: *Frost* v. *Mayor of Chester* (2); *Reg.* v. *Leeds* (3); *R.* v. *Winchester.* (4) The respondent having been prevented from voting as a councillor, has no other remedy than by mandamus. In *R.* v. *Winchester* (4) the same course was taken. It is submitted, therefore, that the order for a mandamus was rightly made.

(1) 2 E. & E. 86, per Lord Campbell, C.J., at p. 91.

(2) 5 E. & B. 531.

(3) 11 Ad. & E. 512.

(4) 7 Ad. & E. 215.

R. S. Wright, in reply. By s. 88 of the Municipal Corporations Act, 1882, an election petition must be presented within twenty-one days from the day on which the election was held. If the contention for the respondent be well founded, the returning officer, by delaying his declaration, might extend the time for presenting the petition. The cases cited which were decided before the Act of 1835 apply here, because a similar difficulty existed then: a person holding a municipal office could be indicted for resigning it or refusing to act in it: *Milward* v. *Thatcher*. (1) In *Reg.* v. *Leeds* (2) there was no question of disqualification of the candidate. The decision merely was that the votes could not be recounted after the time specified in the Act of 1835. That case, therefore, does not apply. Whether the appellant was elected or not, the respondent could have petitioned under s. 87 of the Act of 1882, on the ground that the appellant was disqualified at the time of the election.

LORD ESHER, M.R. In this case Roberts and Pritchard were nominated candidates for the council of one of the wards of the borough of Bangor. At the election the votes were taken, and the returning officer considered the voting papers. Whether he rejected any of them does not appear, but having counted those that were passed, he found that a majority of votes had been given for Roberts. The returning officer stated that fact at the time, but an objection having been taken that Roberts being an alderman was not eligible for election, he stated the number of votes given to each candidate, and said that he should consider the question as to whom he should declare to be elected. Then the mayor, having gained the numbers from the returning officer's statement, announced the numbers from outside the building in which the counting took place. It is clear that the mayor's announcement had no effect whatever. The day after the election the returning officer, having considered the objection and taken advice, issued a placard, in which the numbers were again stated, shewing a majority of votes for Roberts, and by which the returning officer, acting upon the advice he had taken, and upon his own view with respect to the objection, declared Pritchard, and not Roberts, to

(1) 2 T. R. 81. (2) 11 A. & E. 512.

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have been duly elected. Thereupon the town clerk sent Pritchard notice that he had been elected, and Pritchard qualified and took his seat in the council. It appears that a majority of the corporation thought that Roberts, and not Pritchard, had been properly elected, and refused to recognise Pritchard's vote at their meetings. Thereupon Pritchard applied for and obtained from the Queen's Bench Division a peremptory mandamus to the mayor and corporation of Bangor directing them to take Pritchard's vote at all their meetings; though the Court in granting that mandamus declared that they felt great doubt and hesitation. Now in old days if the Court of Queen's Bench had entertained the same doubt and hesitation they would not have granted a peremptory mandamus. They would have allowed a mandamus to issue to which the defendants must make a return, and then there would be an argument upon the return. That course was taken, because in old days no writ of error would lie from a mandamus, the granting of it being purely discretionary, and the Court, therefore, gave the defendant an opportunity of appearing, and arguing on the return the question whether the mandamus ought to have been granted. But the reasons for declining to issue a peremptory mandamus where the Court has doubt and hesitation have now gone, because any order for a mandamus may now be instantly appealed against. I therefore think that, where there is no real dispute about the facts, the Queen's Bench Division are right in not inflicting a prolongation of litigation upon the parties by issuing a mandamus to which a return must be made. This appeal having been brought, we have to act upon our view of the law upon the points raised. It was argued for the respondent that Roberts could not be legally elected; that, if he were legally capable of being elected, he was not elected, and Pritchard was: also that Pritchard, having been declared by the returning officer to be elected, and having qualified and taken his seat in the council, was entitled to hold the office of councillor, and vote at meetings of the council, even although his election in the first instance was wrong, and might have been disputed by a petition. It was said that the office is filled by the election, de facto, of Pritchard, and so long as he is actually filling it, the Court ought to allow this mandamus to issue until

it be shewn in the way prescribed by statute that he ought not to have been elected. The appellant denies all those propositions. The question whether the electors had sufficient notice of the suggested disqualification of Roberts has become immaterial in the view taken by this Court. First, was Roberts ineligible as a candidate for the office of councillor? Now there is no express enactment that an alderman cannot be elected a councillor, but it has been suggested that there is a necessary implication that he cannot be. It has been said that the offices are incompatible, and that two incompatible offices cannot be held by the same person at the same time. The latter proposition is true with respect to the offices of alderman and councillor, not on the ground that they are offices of profit, but on the ground that they are so incompatible that the legislature cannot have intended they should be held by the same person at the same time. What is the consequence of this doctrine? A long series of authorities has upheld the proposition that, when two offices are incompatible, and the suggested ineligibility of the candidate for one of them only arises from the fact that it is incompatible with the office he already holds, he is not thereby prevented from being elected to the second office, whether it be superior in rank or power to the other or not. The cases have decided that, if a person holding one office be elected to another, and accepts that election, he thereby vacates the office he held, and thus the difficulty with respect to the impossibility of holding two incompatible offices is got rid of. There was a long series of decisions before the Municipal Corporations Act, 1835, to that effect. *Reg.* v. *Coaks* (1) is said to have been in conflict with those decisions. It is difficult to suppose that the Court of Queen's Bench intended that their decision in *Reg.* v. *Coaks* (1) should be in conflict with all those earlier cases. They would never have knowingly and willingly overruled those decisions without referring to them in the judgments, and giving their reasons for departing from them. They did not say that they meant to overrule those decisions, which were never cited in *Reg.* v. *Coaks.* (1) It is said that the Court assumed the condition of the law to have been altered by the passing of the Municipal Corporations Act, 1835,

(1) 3 E. & B. 249.

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and that the earlier decisions had become inapplicable and obsolete. It is very strange, if the Court took that view, that they never said so; and it is very strange also that the learned and eminent counsel who argued *Reg.* v. *Coaks* (1) never argued the point. In dealing with that case we must see whether there is not some other reason to explain the decision. Now the case was decided on a special verdict, and the Court could not look beyond the facts found by that verdict, which stated out of court the question we have now to decide, because it found in effect that the alderman who was a candidate for the office of councillor was not eligible because he was an alderman. I think that *Reg.* v. *Coaks* (1) has the same value as a case decided on demurrer where the facts stated in the pleading demurred to must be taken as proved. It is therefore no decision of the Court that an alderman is ineligible for election as a councillor. We have now to decide whether the Municipal Corporations Acts have, or have not, altered the law laid down by the earlier decisions. The proposition seemed strange at first sight that if a man be elected an alderman, even without his consent, he is bound to accept the office and act in it, or pay a fine not exceeding 50*l.*; and the same if he be elected a town councillor; so that if, being an alderman, he be elected a town councillor, he cannot escape from the fine; he must pay it either for resigning the office of alderman, or for refusing to accept the office of councillor. Now the same difficulty existed before the Municipal Corporations Acts were passed. A man at that time was liable to be indicted and fined if he refused to accept or act in a corporate office. But it was held (I think rightly) in the series of decisions before 1835 which have been cited, that election to a second corporate office did not constitute an appointment to that office unless there was an acceptance of it by the person elected, and that, if he accepted it, the first office became thereby vacated. I am of opinion that the principle of those decisions should be applied to cases arising since the passing of the Municipal Corporations Act, 1882. It is therefore not true to say that an alderman, who is elected a councillor, cannot escape a fine for not acting as alderman. He is not a councillor until he accepts the office. I will not decide

(1) 3 E. & B. 249.

whether or not, if he does accept the office of councillor, he is liable to a fine for not acting as alderman. I will assume that he is liable. But by accepting the office of councillor he has done that which is equivalent to resigning the office of alderman. I think that the doctrine and principles laid down in the old cases have not been altered in any respect by the Municipal Corporations Acts of 1835 and 1882, and that the same doctrine and principles apply to the present case. I am therefore of opinion that Roberts was a person who could duly be elected a councillor, and that when he accepted that office the office of alderman became vacant.

It is next said that Roberts was not duly elected because the returning officer did not declare him to be elected. It is not denied that he obtained a majority of votes. We have to say, therefore, what are the powers and duties of a returning officer in a municipal election. First comes the nomination, which is to take place before the mayor, when the borough is divided into wards. It is not necessary here to decide whether the mayor could reject the nomination of a candidate not properly qualified. If he had that power, he did not exercise it in the present case, because he accepted the nomination of both candidates. Then come the powers and duties of the returning officer, which are indicated in and limited by the 2nd section of the Ballot Act 1872. Those powers and duties begin after the close of the poll. He is to take charge of the ballot boxes; open them in the presence of such of the agents (if any) of the candidates as may be present, "and ascertain the result of the poll by counting the votes given to each candidate." The result of the poll is what he is to ascertain, and he must ascertain it in the way prescribed by the Act, and in that way only. The section then proceeds: "and shall forthwith declare to be elected the candidate or candidates to whom the majority of votes have been given." No power is given to him to declare that candidate elected to whom the majority of votes has been *legally* given. The moment he has cast up the votes he must declare the candidate elected who has the arithmetical majority. He may only adjourn for the purpose of finishing the counting. The section does not entitle him to inquire whether the candidate is under any personal dis-

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ability to be elected, whether the candidate be man or woman, or whether the person nominated be dead or alive. The returning officer has simply to perform the arithmetical duty of adding up the votes, and to declare the person elected who has the majority. Though it is not necessary to decide the point, I am inclined to think that his declaration is merely ministerial, and that, if he remained silent and did not make any declaration, the person who had the majority of votes would be duly elected. But in the present case the returning officer did declare that Roberts was the person elected, because he did state the numbers of the votes given to each candidate, and so did all that the Act required him to do. It is said that rr. 45 and 46 of the rules made under the Ballot Act, 1872, conflict with that interpretation. Rule 45 provides that the returning officer shall as soon as possible give public notice of the names of the candidates elected. That provision is said to shew that the declaration cannot be postponed. The phrase is changed in that rule. It is not, as in s. 2 of the Ballot Act, 1872, that the returning officer shall forthwith declare "to be elected" the candidate to whom the majority of votes has been given, but that he shall give public notice of the name of the candidate "elected," shewing that the rule was intended to apply to an election which had been before completed. The rule assumes that the election has been held and declared, and it seems clear that the rules do not contemplate that the public notice which the returning officer shall give is to be any part of the election, for r. 45 goes on to say that in the case of a contested election he shall give public notice of the total number of votes given for each candidate, whether elected or not, and r. 46 provides that he shall give such public notice by advertisements, placards, &c., "or such other means as he thinks best calculated to afford information to the electors." The persons to whom the notice is to be given under the rules are therefore different from the persons to whom he is to make the declaration under s. 2, at the time of the counting of the votes, because that declaration is to be made in the presence, not of the electors (who are not allowed to be present), but of the agents (if any) of the candidates. The declaration under s. 2 is therefore in respect of a wholly different thing. It refers to the declara-

tion of the numbers of the votes given, but the rules refer to a public notice stating who has been elected. I therefore say that the returning officer here had no power whatever to declare Pritchard elected, and the declaration to that effect which he made in the placard issued the day after the election was ultrà vires and void. The only valid declaration he could make was a declaration of the numbers of the votes given to each candidate. If the majority of the votes for Roberts was obtained by illegal or improper means, it could only be questioned by other persons in the proper mode. The returning officer had no right to say whether the votes were obtained by improper means or given to an improper candidate. His duty is to count the votes and nothing more. He has no return to make to anybody, as in the case of a parliamentary election, where a return must be made to the Clerk of the Crown. A municipal election is over the moment the voting papers have been counted and the returning officer has stated the result. I am therefore of opinion that the third objection taken for the respondent fails, and that it is not true to say that Roberts was not properly elected. But it was further urged for the respondent that, because a person who was not duly elected qualified, and took his seat in the council as if he had been duly elected, the person who was duly elected cannot take his seat in the council until he has successfully petitioned against the other. It is said that the returning officer having declared Pritchard duly elected, and Pritchard having qualified and taken his place in the council, the office was filled by him de facto, and that he could not be ousted except upon petition. I have already said that the returning officer had no power to make that declaration, and that it was void; if so, it is equally clear that what the town clerk, acting upon that declaration, did was of no effect whatever; nor, if Pritchard was never properly elected either in form or substance, can the fact that he assumed to qualify for the office make that which had gone before any less void? It is not true to say that he ever filled the office. You can fill an office if all that is necessary has been done in form and substance to elect you to it, although it may afterwards turn out that in law you were not a person entitled to be elected. But here nothing had been done in form or substance to constitute an election of

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Pritchard. I am of opinion, therefore, that all the points taken for the respondent fail; that Roberts was elected, and legally elected, and that he fills the office. The order for a mandamus must be discharged.

LINDLEY, L.J. I am of the same opinion. The main question that arises is, whether or not Roberts, being an alderman when he became a candidate for the office of town councillor, was qualified for election to that office. There is no statute which disqualifies him in terms, nor any rule of law except that which is implied from the fact that a man cannot fill two incompatible offices at the same time. Upon this point I think that the cases cited for the appellant—of which all except one were decided before the passing of the Municipal Corporations Act, 1835—shew that an alderman before that Act was not disqualified from being elected a town councillor. The only result of his being so elected and accepting the office was that he ceased to be an alderman. *Reg.* v. *Coaks* (1), which was decided after the Act, is said to be an authority to the contrary. But that case was decided upon a special verdict which found as a fact that the alderman was disqualified. The question, therefore, was never before the Court, and they were not asked to give any opinion upon it. So far, therefore, as the question depends upon authority, I think that the proposition that Roberts was disqualified from being elected a councillor has not been made out. With respect to the argument that the effect of holding him capable of election would be to make him liable to a fine under s. 34 of the Municipal Corporations Act, 1882, for ceasing to act in the office of alderman, I do not think that the burgesses could have forced him to pay a fine for giving up one municipal office upon taking another. I do not think the Court would have felt bound to put such a construction upon s. 34 as would involve that result. It was further argued that Roberts never was elected; that he never was declared to be elected, and that, so far as there was a declaration, it was a declaration that Pritchard was elected. Looking at the terms of s. 2 of the Ballot Act of 1872, it is, I think, clear that the returning officer

(1) 3 E. & B. 249.

has no power to declare a person elected who has not obtained a majority of votes. It is the majority of votes which determines the election, and the returning officer is to declare that person to be elected to whom the majority of votes has been given. That declaration is to be made forthwith, and it is entirely distinct from the public notice to be given under rules 45 and 46, which provide that the returning officer shall give notice "of the names of the candidates elected," not the names of the candidates declared to be elected. In the present case the returning officer gave public notice that a person was elected who had not been elected. He departed from the language of the Act instead of following it. He did not "forthwith" declare any one to be elected, as the Act requires. I therefore come to the conclusion that Pritchard was not duly elected. It is said that at any rate he filled the office de facto, and therefore is entitled to a mandamus to compel the council to respect him in that office until he is turned out by an election petition. The cases of *Reg.* v. *Leeds* (1), and *Reg.* v. *Winchester* (2), were relied on to support that view. But in those cases the Courts decided that the person who had the majority of votes was properly elected, and they granted a mandamus or quo warranto in his favour. So would this Court if they thought that Pritchard had been duly elected. Upon these grounds I am of opinion that this appeal should be allowed.

LOPES, L.J. I am of opinion that Roberts was eligible for election as a town councillor. It is clear that the fact of his being an alderman on the 2nd of November did not render him ineligible by reason of any statute or any rule of law unless founded upon the ground that the two offices were incompatible. But if they were incompatible, I am clearly of opinion that the acceptance of the subsequent office vacates the former. The cases cited, which were decided before the passing of the Municipal Corporations Act, 1835, support that proposition, and I cannot see that that Act or the Act of 1882 has made any difference in the principle which should be applied. As to the objection that the legislature cannot have intended that an

(1) 11 Ad. & E. 512. (2) 7 Ad. & E. 215.

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alderman should be capable of election to the office of councillor because it would render him liable to a fine, it must be remembered that formerly a person who being elected to a corporate office refused to serve was liable to be indicted, so that the same conditions practically existed then as now, and therefore the earlier decisions apply since the passing of the Acts of 1835 and 1882. *Reg.* v. *Coaks* (1) would at first sight appear an authority to the contrary, having been decided since the passing of the Act of 1835, but the decision proceeded upon a special verdict, which found that the person elected was ineligible, and the question whether he was eligible or not was never before the Court. The earlier cases were not cited in *Reg.* v. *Coaks.* (1) Whether, assuming Roberts was capable of election, he was not duly elected because the returning officer did not declare him to be elected depends upon s. 2 of the Ballot Act, 1872. It is admitted that he had a majority of votes. The material part of that section is the second part, which defines the duties and powers of the returning officer when the ballot boxes have been taken charge of by him after the close of the poll. After he has opened the ballot boxes and counted the votes, "he shall forthwith declare to be elected the candidate to whom the majority of votes has been given." He has no power to inquire to whom the majority of legal votes has been given. I think that directly he has ascertained by counting to whom the majority of votes has been given his simple duty is clearly and indisputably to declare that person elected. It cannot be that he has any power to declare with respect to the eligibility or ineligibility of any candidate. That would be a highly dangerous power to entrust to a returning officer. I am, therefore, of opinion that Roberts was duly elected. It is lastly contended that Pritchard, having gone through the formalities of subscribing the necessary declaration, and having taken his place in the council before Roberts, has filled the office de facto, and cannot be ejected except by quo warranto, or an election petition. That contention amounts to saying that an improper declaration by the returning officer has the effect of filling the office. I think that such a declaration cannot have that effect. I am, therefore,

(1) 3 E. & B. 249.

of opinion that the order for a mandamus was wrong, and should be discharged.

Appeal allowed.

Solicitors for the appellant: *Bloxams & Ellison, for J. B. Roberts & Roberts, Bangor.*

Solicitors for the respondent: *Belfrage & Co., for R. S. Chamberlain & Co., Llandudno.*

Solicitors for the Mayor and Corporation of Bangor: *Simpson, Hammond, & Co., for R. H. Pritchard, Bangor.*

W. A.

EX PARTE FORD. IN RE FORD.

Dec. 13.

Bankruptcy—Bankruptcy Notice—Interpleader Order—Stay of Execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

Where goods taken in execution under a judgment are claimed by a third party, and an interpleader order is made, under which the sheriff withdraws from possession, execution on the judgment has been stayed, within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and therefore the judgment creditor cannot issue a bankruptcy notice.

APPEAL by the debtor from the refusal of the registrar of the County Court at Gloucester, to order a bankruptcy notice to be taken off the file.

The facts and dates are stated in the judgment.

Nov. 29. *Duke*, for the debtor, in support of the appeal. There was no power to issue this bankruptcy notice, and it ought to be set aside. On the 27th of September, when it was served on the debtor, the creditor was not in a position to issue execution on the judgment; the effect of the interpleader order, which had been made and was then in force, was to stay execution within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (1), and consequently the bankruptcy notice is

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1: "A debtor commits an act of bankruptcy . . . .

"(*g.*) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act," and he does not comply with the notice or shew that he has a cross demand, &c.

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invalid, and the debtor has not committed an act of bankruptcy in not complying with it: *Ex parte Chinery, In re Chinery* (1); *Ex parte Woodall, In re Woodall* (2); *Ex parte Ide, In re Ide.* (3) That this was not a judgment on which execution could issue at the time when the notice was served is clear from *Chapman* v. *Bowlby* (4) and *Angell* v. *Baddeley.* (5)

The execution was at an end: *O'Brien* v. *Brodie* (6); *Parsons* v. *Lloyd.* (7)

Cooper Willis, Q.C. (*P. S. Hickey,* with him), for the execution creditor. The interpleader order only directed that the sheriff should withdraw, which does not amount to a stay of execution within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act. The bankruptcy notice therefore was rightly issued.

Duke, replied.

Cur. adv. vult.

Dec. 13. The judgment of the Court (Cave and A. L. Smith JJ.) was read by

CAVE, J. This is an appeal against the refusal by the registrar of the County Court at Gloucester to set aside a bankruptcy notice issued under s. 4, sub-s. 1 (*g*) of the Act of 1883 under the following circumstances:—The respondent had obtained judgment against the appellant, and had issued execution, under which the sheriff levied on August 26 last. On September 1 a third person claimed the goods, and the sheriff thereupon obtained an interpleader order, under which the claimant paid 120*l.* into court, and thereupon, in pursuance of the order, the sheriff withdrew from possession. On September 20 the issue in the interpleader was settled, but on October 8 the judgment creditor obtained leave to abandon the interpleader proceedings: meanwhile, however, the judgment creditor had, on September 27, served on the appellant the bankruptcy notice in question, which the registrar, on October 15, refused to set aside. Sect. 4, sub-s. 1 (*g*), permits the judgment-creditor to serve a bankruptcy

(1) 12 Q. B. D. 342.
(2) 13 Q. B. D. 479.
(3) 17 Q. B. D. 755.
(4) 8 M. & W. 249.
(5) 3 Ex. D. 49.
(6) Law Rep. 1 Ex. 302.
(7) Law Rep. 1 Ex. 307, n.

notice on the debtor when execution on the judgment has not been stayed, and the question we have to decide is whether, in this case, execution has been stayed. Now it has been laid down by Bowen, L.J., in *Ex parte Chinery* (1) that words found in a section of an Act of Parliament which is defining acts of bankruptcy should be construed as strictly as if they occurred in a section defining a misdemeanor, because the commission of an act of bankruptcy entails disabilities on the person who commits it.

Again, in *Ex parte Woodall* (2), where a similar question was under discussion, the Court of Appeal held that the words "execution thereon not having been stayed" shew that the creditor spoken of must be a person who is in a position to issue execution upon the judgment. *In re Ide* (3) is to the same effect.

In this case the sheriff had seized sufficient goods to produce the sum for which he was to levy, but when the interpleader order was made and an issue directed, he could do nothing more until that issue had been decided, for until it was decided he could not know whether he should make a return of fieri feci, or proceed to levy on other goods of the debtor in his bailiwick, or, if there were no such other goods, make a return of nulla bona; nor could the judgment creditor issue another fi. fa. into another county, for, as is established by *Chapman* v. *Bowlby* (4), a second fi. fa. cannot be issued until the first is returned, for, if anything has been recovered under the first writ, the second must recite it, and must be indorsed with a direction to levy the balance only; and the sheriff in this case could not return the first writ until the issue was decided, for until then he could not know whether to make a return of fieri feci or nulla bona. This was therefore, in substance, a stay of execution until the issue in the interpleader was decided.

Moreover, a consideration of the remaining part of the section is not unimportant. The notice must require the debtor to pay the judgment debt in accordance with the terms of the judgment. How could the notice comply with this provision so long as the issue in the interpleader was undecided?

(1) 12 Q. B. D. 342, at p. 346.
(2) 13 Q. B. D. 479.
(3) 17 Q. B. D. 755.
(4) 8 M. & W. 249.

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Ex parte Ford. In re Ford.

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If the issue were decided in favour of the execution creditor, it would follow that the sheriff had, on August 26, seized goods of the debtor to an extent sufficient to satisfy the judgment, and consequently that nothing remained to be paid. Why should the debtor be required to pay, or give security for, a debt which had been in substance levied on his goods, because some third person chose to set up an unfounded claim to them? It was open to the judgment creditor to get an order in chambers permitting him to abandon the issue in the interpleader, and then again he would be in a position to enforce his judgment by levying on other goods of the debtor. But when this notice was served upon the debtor that course had not been taken, and we come to the conclusion that the creditor was not, on September 27, in the position required by the section, that is to say, although he had obtained a final judgment, he was not then in a position to issue execution. The appellant, therefore, was entitled to the order he asked for, and the decision of the registrar must be reversed, and the bankruptcy notice must be set aside, with costs here and below.

Appeal allowed.

Solicitor for debtor: *Cuthbert Curtis.*

Solicitors for respondent: *Walker, Son & Field, for C. Herbert Collis, Stourbridge.*

P. B. H.

DUFOURCET & CO. *v.* BISHOP AND OTHERS.

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Nov. 27;
Dec. 21.

Ship—Charterparty—Marine Insurance—Advanced Freight insured—Right to recover—Subrogation of Insurer to Rights of Assured.

Goods were shipped on the defendants' ship under a charterparty, which provided that if required the whole freight should be advanced subject to a deduction for interest and insurance. The freight was paid in advance, and the amount was insured. The charterers sold the goods to the plaintiffs at a price covering cost, freight, and insurance. The cargo was lost by the negligence of the defendants.

In an action for the loss of the goods:—

Held, that the plaintiffs were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified the plaintiffs were entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled.

ACTION tried by Denman, J.

The action was brought by the plaintiffs, the owners of a cargo shipped on board the *Aurora*, against the defendants, the owners of that ship, for damages for non-delivery of the cargo, which was lost by the negligence of the defendants. The plaintiffs claimed to recover 3672*l.* 15*s.* 6*d.*, which they had paid for the goods to Gibbs & Co. from whom they had bought them, 600*l.* of this having been paid for advanced freight as provided by the charterparty.

It was admitted at the trial that the plaintiffs had agreed to sell to merchants in America 1500 tons of superphosphate; that they had bought this amount from Gibbs & Co. in London, they being at liberty to insure in America; that Gibbs & Co. had chartered the defendants' ship to deliver the goods in America; that they had paid 600*l.* as advanced freight as provided by the charterparty; that they had insured the amount so paid on behalf of the plaintiffs and had handed the bills of lading and the policy to the plaintiffs, who had paid them 3672*l.* 15*s.* 6*d.*, including therein 600*l.* paid as advanced freight; that the cargo was lost by the negligence of the defendants; that an arrangement had been made with the insurers of the cargo in America by which the plaintiffs had received 2700*l.* exclusive of the 600*l.*

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paid as advanced freight; that the insurers of the freight had indemnified the plaintiffs; that the action was as to this amount being continued for the benefit of the insurers; that the question was whether the plaintiffs were entitled so to continue it; and that 600*l.* was the sum which the plaintiffs were entitled to recover if they were entitled to recover at all.

Cohen, Q.C., and *J. Aspinall*, for the plaintiffs. They cited *Rodoconachi* v. *Milburn* (1); *Russell* v. *Niemann* (2); *Ireland* v. *Livingstone* (3); *Great Indian Peninsula Ry. Co.* v. *Turnbull.* (4)

G. Barnes, for the defendants. He cited *De Silvale* v. *Kendall* (5); *Hicks* v. *Shield* (6); *Frayes* v. *Worms* (7); *Byrne* v. *Schiller* (8); *Simpson* v. *Thomson.* (9)

Cur. adv. vult.

Dec. 21. DENMAN, J. The question in this case, which was tried before me without a jury, arose upon the following state of facts:

In October, 1885, the plaintiffs, Dufourcet & Co., were under contract to sell to certain merchants in America named Malcolmson, 1500 tons of superphosphate. In order to enable them to perform this contract, they, on the 23rd of October, 1885, and other days, entered into three contracts with Gibbs & Co., merchants in London, each contract being for 500 tons of superphosphate at so much per ton to be shipped in fine dry merchantable condition, cost, freight and insurance by steamer to Savannah. Payment three-fourths cash in London against documents, and balance in ten days from shipment. Buyers to have option of insuring in America, seller allowing current rate of premium ruling here. Discount and commission 3½ per cent.

As explained by Lord Blackburn in the well-known case of *Ireland* v. *Livingstone* (10), the contract price under these contracts was one for the whole of the valuable things to be done or

(1) Ante, p. 67.
(2) 34 L. J. (C.P.) 10.
(3) Law Rep. 5 H. L. 395.
(4) 53 L. T. 325.
(5) 4 M. & S. 37.
(6) 7 E. & B. 633; 26 L. J. (Q.B.) 205.
(7) 19 C. B. (N.S.) 159; 34 L. J. (C.P.) 274.
(8) Law Rep. 6 Ex. 319.
(9) 3 App. Cas. 279.
(10) Law Rep. 5 H. L. 395, at p. 406.

given by the consignor to the consignee, viz., the actual cost of the goods with the premium of insurance and the freight.

On the 5th of November, Gibbs & Co. entered into a charterparty with the defendants for the steamer "*Aurora*." It was admitted that the plaintiffs did elect to insure in America. If they had not done so Gibbs & Co. would have insured as part of their duty under the contract, and have handed over the policy to the plaintiffs.

The charterparty provided, that if "required by the captain the whole freight to be advanced on signing bills of lading subject to a deduction of 3½ per cent. for interest and insurance;" and that the ship was to "have an absolute lien upon the cargo for all freight, dead freight, and demurrage, charterer's responsibility ceasing on shipment of cargo."

Gibbs & Co. paid the master 600*l.* on account of the freight on signing bills of lading as required by the master, and they effected on the 24th of November an insurance for 600*l.* on the freight so advanced in the name of their own brokers Brown & Co. on behalf of the plaintiffs with the City of London Insurance Company and handed that policy over to the plaintiffs.

The 1500 tons were shipped in London, and the ship went to Hartlepool in accordance with the charterparty and bills of lading. She left Hartlepool on her voyage to Savannah on the 25th of November at 5 P.M., and was lost on the same evening within three hours by, as was admitted, the negligence of the defendants' servants.

On the 1st of December the plaintiffs paid Gibbs & Co. for the 1500 tons including the 600*l.* paid for advanced freight, and the amount due in respect of the policy (for which they had become liable at the current rate of premium according to the contract), the sum of 3672*l.* 15*s.* 6*d.*; received in exchange for the policy for 600*l.* and three bills of lading each for 500 tons of superphosphate.

Upon the loss of the vessel being known the plaintiffs claimed from the defendants the above sum of 3672*l.* 15*s.* 6*d.*, and brought this action on the 12th of December, 1885.

In the statement of claim as originally delivered on the 7th of January the plaintiffs sued upon the bills of lading, alleging

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default in the delivery of the goods and negligence which occasioned the loss of the ship and the goods on board. Subsequently the statement of claim was amended by adding a statement that prior to the shipment Gibbs & Co., from whom the plaintiffs had purchased the goods for 3672*l.* 15*s.* 6*d.* to cover cost, freight, and insurance, and who had been paid that amount by the plaintiffs, had paid to the master 600*l.* as an advance of freight.

To this part of the statement of claim (as amended) the defendants pleaded in the 7th and 8th paragraphs of their amended defence, first, that Gibbs & Co. and the plaintiffs by the charter-party and the bills of lading undertook to insure the advance freight, and to look to the underwriters thereon for any loss of the same capable of being covered by an ordinary marine policy, and not to the defendants; and secondly, that if the defendants were liable to be sued by the plaintiffs, the plaintiffs ought not further to maintain the action (i.e. in respect of the 600*l.*), for that on the 18th of March, 1886, the defendants satisfied and discharged all claims of the plaintiffs against the defendants, and all damages and costs in respect thereof by payment of 2700*l.* which was accepted and received by the plaintiffs in satisfaction and discharge of the said claim, damages, and costs.

The only question raised before me was whether the plaintiffs could maintain this action for the benefit of the underwriters of the policy for 600*l.* advanced freight.

The facts relating to this part of the case were as follows:—

After the present action was brought it was found that the defendants were insured in two mutual insurance companies which had insured them not only against the loss of the ship but against such liabilities as they might incur by the loss of the ship. Negotiations were entered into between one Wetherby on behalf of the plaintiffs, and Riley acting for the mutual companies and for the defendants, with the object of enabling the plaintiffs to obtain compensation from those companies instead of looking to the defendants for compensation. Ultimately, a compromise was arrived at and the plaintiffs received 2700*l.*, which the defendants in their 8th paragraph of the defence set up as a settlement of the plaintiffs' whole claim, including the 600*l.*, which was part of

the 3672*l.* 15*s.* 6*d.* paid by them to Gibbs, but which the plaintiffs alleged was expressly excluded from the settlement.

The letter, which the defendants contended had the effect of a settlement of the whole of their claim of 3672*l.* 15*s.* 6*d.* was dated the 17th of March, 1886, addressed to the owners of the ship signed by Dufourcet & Co., and was as follows:—

"*Dufourcet & Co.* v. *Bishop & Others. Re Aurora, SS.*

"In consideration of your paying us the sum of 2700*l.* in full settlement of our claim for the loss of the cargo of the superphosphate in the above action we hereby agree to abandon that part of the said action which relates to the cargo and to pay all our own costs therein, to discharge all our witnesses, and not to render any assistance to the company in which the advance freight of 600*l.* is insured unless compelled to do so. We also agree to hand you the original invoices and bills of lading duly indorsed for the whole of the said cargo, the invoices of cost thereof and the charterparty etc., also to assign to you at your expense all our rights of recovery of the loss of the said cargo against the American underwriters on the same, and to hand you any requisite documents we may have in our possession and control in support of the claim against the said underwriters, and to render you every assistance in our power at your expense with a view to the recovery of the same, which when recovered shall be entirely for your benefit, you holding us harmless and indemnified against any claims that may be made on us by the said underwriters consequent upon any proceedings by you against them.

"We further agree not to apply to the said underwriters for the return of the premium of insurance on the said cargo within six months from this date, unless in the meantime you inform us that you will not proceed against the said underwriters for the loss of the cargo."

This letter is somewhat ambiguous in its terms, but I can only understand it as abandoning that part of the plaintiffs' claim which consists of the claim in respect of the cargo as distinct from and exclusive of the amount of the advance freight of 600*l.* which is specifically mentioned in the letter. The whole action and not part only at that time (the 17th of March) related to the

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cargo, so that the provision to abandon that part would be senseless unless something was meant to be excluded, and there is nothing else which can be suggested except the advanced freight in respect of which the plaintiffs could have recovered anything by reason of the loss of the cargo. I think, therefore, that the agreement of the 17th of March does not prove the 8th paragraph of the defence setting up the payment of 2700*l.* as a settlement "of all claims of the plaintiffs against the defendants and all damages in respect thereof."

The defendants, the shipowners, further contended that no action would lie against them at the suit of the plaintiffs in respect of the 600*l.* advanced freight because by the charterparty and bills of lading the plaintiffs and Gibbs & Co. were bound by the stipulation as to advanced freight, and the freight of 600*l.* had been advanced accordingly, and the plaintiffs and Gibbs & Co. undertook to insure and look to the underwriters for any loss which could be covered by insurance, and that inasmuch as the plaintiffs could not recover back the 600*l.* from the defendants on their own account (according to *De Silvale* v. *Kendall* (1), and other cases), neither could they sue for the benefit of the insurers in order to indemnify them against a risk for which they were liable under the policy, but for which the defendants, the shipowners, were not liable at all.

I am of opinion that this defence merely amounts to an ingenious attempt to defeat the City of London Insurance Company of its right to be subrogated to the rights of the plaintiffs, as against the defendants in respect of so much of the damages recoverable by the plaintiffs as they had covered by the policy of the 600*l.*, on which the company had been compelled to pay the plaintiffs that amount.

I think it clear from the decision of the Court of Appeal in the very recent case of *Rodoconachi* v. *Milburn* (2), that upon the loss of the vessel by the negligence of the defendants, the plaintiffs were entitled to damages including the 600*l.* for which they were liable to Gibbs & Co., as part of the value of the cargo at the end of the voyage. I think it equally clear that they had no right as against the insurers of that advanced freight to barter away

(1) 4 M. & S. 37. (2) Ante, p. 67.

their right to recover it as part of the damage sustained by them by the loss of the cargo. And I also think that they have not even purported to do this by the compromise of the 17th of March, which does not use language which need necessarily so be construed, inasmuch as they only profess to abandon a portion of their action, and the document in which they do so draws a distinction between "that part which relates to the cargo" and the 600*l.* in question, and contemplates the possibility of their being called upon to do the very thing they are now doing, viz., to be plaintiffs for the benefit of the insurance company as insurers of the 600*l.* advance freight.

All they stipulate to do in that respect is not to render any assistance to the company in which the advance freight is insured unless compelled to do so. But if the insurance company has a right to be subrogated to their rights as against the defendants, so far as the loss of this 600*l.* is concerned, they are compelled to give all the assistance which is required, viz., not to object to the use of their name to enable the insurance company, who have fully indemnified them for this part of their damage, to recover it from the defendants as part of the damage caused by the negligent loss of the cargo.

It was admitted on the hearing that the insurance company had insisted on the action being continued for their benefit in respect of the 600*l.* in question.

I do not think that the cases cited by Mr. Barnes are at all inconsistent with this view. Though they establish as a general rule that money paid by way of advanced freight cannot be recovered back on the failure of the voyage, they by no means establish that where the cargo owner has, as part of the price of the goods, paid or become liable to pay a sum for freight in advance, and the goods are lost by negligence of the shipowner, he may not as part of his damages (which are to be considered with reference to the value of the goods at the port of arrival) be allowed as against the shipowner an amount equal to the freight so advanced, and, if he happens to be partially indemnified against that loss by an insurance of that very amount of advanced freight, I can see no reason why the insurer of that amount should not be entitled to sue in his name for it as part of the damage which

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the cargo owner, but for the insurance, would have sustained by the defendants' negligence.

I think for the above reasons that the plaintiffs are entitled to judgment for 600*l.*, and I give judgment accordingly for that amount with costs.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *O. H. Clarkson.*

Solicitors for defendants: *Turnbull, Tilly & Mousir, for Turnbull & Tilly, West Hartlepool.*

R. B. R.

Dec. 3, 21.

IN RE BEETHAM. EX PARTE BRODERICK.

Equitable Mortgage—Deposit of Title Deeds—Parol Trust in favour of Creditor—Bankruptcy.

A., being indebted to a banking company in respect of an overdrawn account, wrote to the directors promising to give them, when required, security over his reversionary interest in one-fifth share of a farm, to come into possession on the death of the life tenant; but no formal security was ever executed in accordance with this promise. After the death of the life tenant the deeds of the farm came into the possession of A.'s brother, the manager of the bank, for the purpose of paying the succession duty; and he continued in possession of them, claiming, as regards A.'s share, to hold them for the banking company with the consent of A. (verbally given) as security for the overdrawn account. There was no memorandum of the deposit in the bank books, nor was the usual printed form of deposit of title deeds by way of security made use of with reference to the transaction. A. subsequently became bankrupt:—

Held, that the company had not a valid equitable mortgage on the bankrupt's share in the farm, and that they could not hold the rents as against his trustee in bankruptcy.

APPEAL from the county court judge at York.

The facts and arguments sufficiently appear from the judgments.

1886. Dec. 3. *Ambrose, Q.C.*, and *J. Broughton Edge*, for the appellant.

Forbes, Q.C., and *Luck*, for the respondent.

Cur. adv. vult.

1886. Dec. 21. CAVE, J. This is an appeal by the trustee from a refusal by the judge of the County Court at York to order the respondent to pay over to the trustee the bankrupt's one-fifth

share of the rents of certain freehold property, and to deliver to the trustee three shipping bonds. As to the freehold property the respondent alleges that the Darlington District Bank is entitled to an equitable charge on the bankrupt's interest, and as to the bonds the respondent claims them as his own. So far as the bonds are concerned the case depends almost entirely on the evidence of the respondent, and we are not prepared to say that the conclusion of the county court judge is wrong.

As to the freehold estate, we must also take it that the judge of the county court believed and acted upon the respondent's testimony, and the question for us is whether, assuming it to be true, it establishes an equitable mortgage.

The respondent was the general manager of the Darlington District Bank, and the bankrupt, his brother, was the local manager of a branch at Leyburn. Before May 28, 1874, the bankrupt had been engaged in some speculative transactions in conjunction with a man named White, and an account at the bank opened in White's name only had been overdrawn to the extent of 4229*l*. At the same time the bankrupt's own account was overdrawn to the extent of 100*l*. In consequence of these irregularities a meeting of the directors was held at Leyburn, and the bankrupt gave them the letter of May 24, 1874, which is in the following terms:—

"Darlington District Banking Co.,
"Leyburn, 28th May, 1874.

"To the Directors of the Darlington District Banking Company.

"Gentlemen,—Referring to the subject of your conversation last Thursday, I shall be happy to give you at any time, whenever required, security over my share of the farm, in any shape or way you may deem best. I have had some conversation with Mr. White respecting his giving security, but I regret I could not get him to ask his brother when over, as he does not wish to do so, if it can possibly be avoided.

"I enclose a letter from him and remain, Gentlemen,

"Your obedient servant,
"E. W. Beetham."

At this time the bankrupt was entitled to a reversionary interest

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in one-fifth share of the farm in question, to come into possession on the death of his mother, who was entitled to a life interest in the rents and profits and who held the title-deeds. The bankrupt was never called upon to execute any security in conformity with the promise contained in the letter of May 28, 1874, which Mr. Forbes rightly admitted did not give the bank any equitable charge. On September 8, 1881, the mother died, and thereupon the title deeds of the farm came into the possession of the respondent who was also entitled to one-fifth of the property. There was a trustee under the will of the respondent's father, who would seem to have been entitled to hold the deeds, but they had in fact been handed to the respondent for some purpose connected with the payment of succession duty. The respondent when he received the deeds locked them up in a safe in his room at the bank, and has ever since retained possession of them, although it is two and a half years since he ceased to act as manager for the bank or to reside on the bank premises. He says, "I told my brother that I had got possession of the deeds. I cannot say any particular conversation took place about them. I told the bankrupt expressly that I held one-fifth for the bank. He said it was all right, he knew it." In cross-examination, the respondent said, "I cannot say when the conversation took place with the bankrupt about my holding his one-fifth for the bank. It might be in my house or in the board-room at a meeting. I feel certain it was named in the board-room after my mother's death, but I cannot say who was present." The bank had printed forms of deposit of title deeds by way of security, but none such was used with reference to these deeds; nor is there any memorandum of the deposit to be found in any book; nor does any director or official of the bank confirm the respondent's feeling of certainty that the matter was named in the board-room.

The question we have to decide is whether these facts are sufficient to establish an equitable mortgage by deposit of title deeds. The law on the subject is stated in Fisher on Mortgages in a somewhat confused manner, but it must, I conceive, be conceded that it forms a branch of the equitable doctrine of the specific performance of oral contracts relating to land based on part performance. It has been held that there is an inference from the

mere deposit of title deeds that it was intended to give an interest in the land, and in that way there is something more than a mere oral contract, something in the nature of part performance, so as to take the case out of the Statute of Frauds. Several cases were cited to us by Mr. Forbes, which it will be convenient to consider. In *Lloyd* v. *Attwood* (1), it was held that, as an equitable mortgage could be created by a deposit of title deeds with a trustee for the intended mortgagee, it could not be denied that a borrower might deposit his title deeds with his own solicitor as such trustee. *Fenwick* v. *Potts* (2), which was also cited, was not a case of mortgage by deposit, for the equitable mortgage was created by a letter signed by the mortgagor. *Daw* v. *Terrell* (3) is, at first sight, in favour of the respondent; but when it is looked into more closely the analogy vanishes. In that case the intestate, being indebted to the plaintiff, agreed to secure the amount by a charge on his property, and wrote and gave the plaintiff an unsigned memorandum directing his bankers as soon as their lien was satisfied to give the plaintiff an assignment of a field and garden; at the same time the intestate handed to the plaintiff two leases of other property. It was contended that as regarded the field and garden there was no equitable mortgage, because the memorandum was not signed and there was no deposit. Lord Romilly, however, held, not that an unsigned memorandum without a deposit was sufficient, but that it was all one transaction and consequently a part performance of one entire agreement, and the whole agreement could be specifically enforced.

There is in fact, so far as I am aware, no case which goes the length of holding that, where a third person already has possession of title deeds for another purpose, an oral communication from a part owner of the property to which the title deeds relate, purporting to make such third person a trustee of the deeds for a creditor, can create a good equitable mortgage in favour of that creditor; indeed, to hold so would be entirely to repeal the Statute of Frauds so far as the creation of equitable mortgages is concerned. I am aware that the learned judge whose decision we have before us has had much experience in the practice of

(1) 3 De G. & J. 614. (2) 8 D. M. & G. 506.
(3) 33 Beav. 218.

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equity, and therefore have considered with great attention the reasons he gives for his decision. He says that from the letter of May 28, 1874, and the evidence given, "there could be no doubt about the intention to create an equitable charge, and then, when the deeds came into the possession of any one who, acting for the bank, would not part with them till that charge was satisfied, the charge attached to the deeds." I am not sure that I exactly follow his Honour's meaning. He does not appear to treat the letter as creating a charge, and before us it was admitted that it did not do so; nor does he seem to attach any importance to a deposit by the mortgagor. I rather gather that he held that if there was a signed promise in writing not amounting to a contract to give a mortgage because not sufficiently specific, and subsequently possession obtained of the deeds under circumstances not amounting to a deposit by the mortgagor, the two things would unite together and form a transaction which, although neither a sufficiently specific signed contract in writing to create an equitable mortgage, nor yet a deposit of title deeds, would yet be something between the two which would be equally available to create an equitable mortgage. I am not aware of any authority for this position, and certainly none was cited to us at the bar, and in the absence of such authority I must act on my own judgment and hold that the equitable mortgage relied on was not made out. As to the freeholds, therefore, the trustee is entitled to the relief he asks, and to this extent the order appealed from must be reversed. As, however, each party has succeeded in part, there will be no costs of this appeal.

WILLS, J. I agree entirely with the judgment of my Brother Cave. The arguments both upon the facts and upon the law occupied a considerable time. One result has been to enable us the more readily to discard all immaterial portions of the evidence; and when stripped of everything that is immaterial, the part of the case upon which we differ from the learned county court judge appears to me singularly simple, and its legal result is to my mind quite free from doubt.

The brother of the bankrupt, it seems, held the deeds of property in which he and the bankrupt were each beneficially interested to the extent of one fifth. Under these circumstances,

the bank was pressing for a reduction of the bankrupt's indebtedness, and, to put the case of the bank as high as it is possible to put it, the bankrupt, at the request of the bank, directed his brother to hold the deeds, so far as the bankrupt's one-fifth was concerned, in trust for the bank, and the bankrupt's brother consented so to hold them and communicated his assent to the bank. Thus much was done, and nothing more.

Now it is clear that the law of equitable mortgage by deposit of title deeds depends upon the same principles as the general law of specific performance as applied to cases where, in respect of contracts relating to interests in land, the Statute of Frauds is not complied with: *Maddison* v. *Alderson* (1); and the question must be whether there has been any part performance of the contract such as would entitle the bank to have the contract specifically performed. On their part there has been a forbearance to enforce immediate payment of a money demand. That, upon all the authorities, is not an act of part performance sufficient for the purpose. On the part of the bankrupt there has been nothing but the creation of a parol trust in favour of the bank touching his interest in the property. A mere parol trust (without more) in land is, in law, nothing. There is nothing more in this case, and therefore there has been on the part of the bankrupt nothing in the shape of part performance; and the case of the bank therefore fails.

With respect to *Daw* v. *Terrell* (2), I doubt very much if it can be reconciled with the doctrine that the act of part performance relied upon must in its nature be referable to the specific parol contract sought to be enforced. It is, however, unnecessary to discuss that question, inasmuch as it is, for the reasons given by my learned Brother, clearly distinguishable from the present case.

Appeal allowed.

Solicitors for appellant: *Torr, Janeways, Gribble & Oddie, for Cockcroft, Rochdale.*

Solicitors for respondent: *Clarke, Rawlins & Co., for Willan & Raine, Darlington.*

(1) 8 App. Cas. 467, 480.

(2) 33 Beav. 218.

W. J. B.

1886
Aug. 4, 10.
1887
Jan. 26.

[IN THE COURT OF APPEAL.]

WATKINS *v.* EVANS.

Bill of Sale—Validity—Power of Sale—Mortgage Debt made payable in one Sum—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 20—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Scheduled Form.*

A bill of sale, given as security for money, was in the form set forth in the schedule to the Bills of Sale Act, 1882, except that the mortgage debt (instead of being made payable by instalments) was made payable, with interest, in one sum, a month after the date of the deed, and there was a covenant by the grantor, in case the principal money should not be then paid, to pay interest half-yearly on the principal money remaining unpaid. There was also a covenant by the grantor to insure the chattels comprised in the deed, and to produce the receipts for premiums to the grantee:—

Held, that the bill of sale was valid, and that, interest being in arrear for more than two months, the grantee had power to seize the chattels, and to sell them after the expiration of five days from the seizure.

Per Bowen and Fry, L.JJ. The power of sale was conferred by s. 19 of the Conveyancing Act, 1881, subject to the restrictions imposed by s. 20 of that Act and by s. 13 of the Bills of Sale Act of 1882.

Per Lord Esher, M.R. The Conveyancing Act did not apply, but there was an implied power to seize and sell under the Act of 1882.

A bill of sale given as security for money, by which the mortgage debt is made payable in one entire sum, is "in accordance with" the statutory form.

Appeal against a decision of Field and Wills, JJ., affirming an order made by Day, J., restraining the defendant (who was the grantee of a bill of sale of chattels given by the plaintiff as security for money), until the trial of the action, from seizing or selling the chattels.

The facts are stated in the judgment delivered by Fry, L.J.

The defendant appealed.

1886. Aug. 4, 10. *Edward Pollock*, for the appellant.

English Harrison, for the plaintiff.

The following cases were cited as to the validity of the bill of sale: *Hetherington* v. *Groome* (1); *Ex parte Stanford* (2); *Blaiberg* v. *Parsons* (3). The argument as to the existence of a power of sale were similar to those on the appeal in *Ex parte Official Receiver*,

(1) 13 Q. B. D. 789. (2) 17 Q. B. D. 259.
(3) 17 Q. B. D. 336.

In re Morritt (1), the first hearing of which had taken place just before the hearing of the appeal in the present case.

Cur adv. vult.

1887. Jan. 26. FRY, L.J., read the following written judgment of himself and BOWEN, L.J. The plaintiff in this case is the grantor of a bill of sale and the defendant is the grantee.

On June 23, 1886, an ex parte order was made by Day, J., in chambers, restraining the defendant from seizing or selling under the bill of sale the chattels comprised in it, and the injunction thus obtained was extended by subsequent orders of the learned judge until the hearing of the action. From these orders the defendant appealed to the Queen's Bench Division, who dismissed the appeal with costs. Thereupon the defendant has appealed to this Court.

We have been somewhat imperfectly informed of what took place both in chambers, and before the Divisional Court, but it is obvious that the injunction must be supported either on the ground of the invalidity of the bill of sale, or on the ground that, assuming it to be valid, the defendant was acting in excess of his rights under it.

In a general way we should be loth to interfere with the order of a Divisional Court granting an injunction only till the hearing, and postponing till that time the final adjudication of the rights of the parties. But, having regard to the course which the argument of this case has taken, we think that we ought now to express our opinion on the respective rights of the parties, as if at the hearing of the cause. And we are the more willing to take that course in the present instance, as the main reason, so far as we can learn, why the learned judges below, both in chambers and the Divisional Court, left the final adjudication to the hearing, was that they considered, and no doubt rightly considered, that the question, whether a power of sale is implied in the statutory form of bill of sale, was one of great and general importance, and it so happens that this point has been the subject of much discussion before us, not only in this, but in other cases.

(1) Ante, p. 222.

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The bill of sale in question bears date March 13, 1886, and by it the plaintiff assigned certain household furniture to the defendant by way of security for money. The bill of sale appears to have been drawn with an anxious desire to follow the statutory form. It contains a covenant to insure the chattels in the sum of £350, and to produce to the grantee the receipts for the premiums paid, but there is nothing in these stipulations which appears to us to go beyond the liberty reserved by the statutory form. The provision with regard to the payment of the principal and interest is to the effect, that the entire principal, and the interest then due, should be paid on April 13 then next, and that, so long after that day as any principal money should remain due, interest should be paid half-yearly, on October 13 and April 13 in every year. The statutory form contains a stipulation for payment by equal portions, but it also contains in the words in the brackets a liberty to substitute "whatever else may be the stipulated times or time of payment." It has been argued that this does not relieve the contracting parties from the obligation to fix the repayment by equal portions. But the words "time of payment" contrasted with the plural "times," shew that a single payment is admissible, and, therefore, that there is no obligation to divide the repayment into any number of equal portions. For this reason we think that the mode of payment provided by the bill of sale in question is lawful, and that no objection can be sustained to the validity of the document.

But the defendant has threatened to sell the assigned chattels, and it has been argued that he has no power of sale. The decision of the majority of the Court in *Ex parte Official Receiver, In re Morritt* (1) has, we conceive, laid down this rule—that the power of sale given by the Conveyancing Act of 1881 does apply to a bill of sale in the statutory form, unless where—under the power given by the statutory form to add clauses for the maintenance of the security—some other provision is introduced which shews that the power of sale given by the Act of 1881 is unnecessary: and, further, that a power to seize, with the power of sale which thereupon arises, is such a provision, and accordingly repels the introduction of the statutory power of sale.

(1) Ante, p. 222.

In the present case there is no express power of seizure, and there appears to us to be no other provision which shews that the statutory power of sale would be unnecessary. We are, therefore, of opinion that the bill of sale before us does, by force of the Act of 1881, carry with it a power of sale, but subject to the fetters imposed by the 20th section of that Act, and by the 13th section of the Bills of Sale Act of 1882.

One of the contingencies mentioned in the 20th section of the Act of 1881, as setting free the power of sale, is that of some interest under the mortgage being in arrear and unpaid for two months after becoming due. In our opinion that contingency had happened before the injunction was granted. Interest had become due and payable on April 13, 1886, and it remained unpaid on June 23, i.e., for more than two months.

The 13th section of the Act of 1882 provides that the property shall not be sold until after the expiration of five clear days from the day when it was seized or taken possession of. In the present case it appears that the goods were seized, and possession taken, on June 9, i.e., more that five clear days before June 23. Consequently, it appears to us that, at the time when the injunction was granted, there was a valid power of sale capable of being put in execution, and that the injunction cannot be sustained. The orders, therefore, of Day, J., and of the Queen's Bench Division must be discharged, and an inquiry directed as to the damages sustained by the defendant by reason of the injunction having been granted, with the usual direction for payment of the amount to be ascertained on such inquiry; and the plaintiff must pay the costs of all the motions both here and below.

If the plaintiff be reasonable he will consent to this motion being treated as the hearing of the cause, and in that event we shall direct him to pay to the defendant the costs of the action, and stay all proceedings in it, except for the purpose of giving effect to the inquiry as to damages, and the consequent direction for payment.

LORD ESHER, M.R. I never felt any doubt as to the validity of this bill of sale, and I agree in the result of the judgment of my learned brethren. But I retain the opinion, which was

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expressed by Lopes, L.J., and myself in *Ex parte Official Receiver* (1), that none of the provisions of the Conveyancing Act of 1881 are introduced into a bill of sale which is regulated by the Bills of Sale Act of 1882.

Solicitor for appellant: *Frederick Romer, for Lloyd, Lampeter.*

Solicitor for plaintiff: *Griffith Jones & Co., for Jones, Aberystwith.*

W. L. C.

Jan. 27.

[IN THE COURT OF APPEAL.]

HOCKEY *v.* EVANS AND ANOTHER.

Practice—Interpleader Summons—Particulars of Claim—Order LVII., rr. 5, 12.

Where, upon an interpleader summons by the sheriff, a claimant alleges that he is entitled, under a bill of sale or otherwise by way of security for debt, to the goods seized in execution, and an order is made for the sale of the goods and the satisfaction of the claim out of the proceeds of the sale, the claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim on which the order was made.

APPEAL from the judgment of the Master of the Rolls at the trial of the action without a jury.

The defendants, as sheriff of the county of Middlesex, having seized goods under a writ of fieri facias in an action in the High Court, the present plaintiff claimed the same, and the defendants interpleaded. In an affidavit filed in support of his claim the plaintiff alleged that the goods belonged to him under a bill of sale duly registered, and that he had taken possession of them. He further alleged that there was then due to him under the bill of sale the sum of 750*l.* and interest thereon as therein provided from the date thereof. The master, under Order LVII., r. 12, ordered that the sheriff should sell, and out of the proceeds of the sale (after deducting the expenses thereof and rent, if any), should pay the claimant the amount of his claim. The sheriff accordingly sold the goods and paid the sum of 750*l.* The plaintiff claimed the interest, and also a sum of 23*l.* for costs and

(1) Ante, p. 222.

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charges incurred by him, and recoverable under the terms of the bill of sale, and he brought this action against the sheriff to recover these sums. The interest was paid into court. The Master of the Rolls gave judgment for the plaintiff for the 23*l.* on the ground that it was not usual to make a claim for costs in the affidavit filed by a claimant on an application under Order LVII., r. 5, for an interpleader summons.

The defendants appealed.

Cock, Q.C. (*Rose Innes*, with him), for the defendants. The sheriff was under no obligation to pay anything which was not mentioned in the order. The object of requiring particulars is that the master shall decide everything in dispute, and so relieve the sheriff from having to exercise judicial functions.

Wynch, for the plaintiff. The plaintiff was entitled under the bill of sale to the payment of the expenses. The bill of sale was before the master, so that the sheriff would know that it covered costs and charges. It is not usual in such an order to mention the costs and charges, and the practice at chambers is to treat them as included in such an order. The claimant ought to be paid all that he is entitled to recover under the security of the bill of sale, and that is the fair meaning of the order.

SIR JAMES HANNEN. I think the decision appealed against cannot be supported. We have learned that it was the result of a conference with some of the masters of the Court, and it may be that such a practice as is relied on has grown up at chambers, of which the Master of the Rolls was informed. We have, however, not to determine whether there is such a practice, but to deal with the rules, and the practice, if it exists, seems to me contrary to them. Order LVII., r. 5, says that the applicant for relief, by way of interpleader may take out a summons calling on the claimants to appear and state the nature and particulars of their claims. The object is that there may be the necessary information before the master on which he may proceed. In this case we have no evidence of any other information being before the master as to the claim of the present plaintiff than that contained in his affidavit. The particulars in that affidavit are

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confined to the debt and interest, and the master made his order with reference to that state of things. The sheriff acts under the authority of the order of the master, and to throw on him the duty of determining the validity of any claim not included in that order, would put him in the difficulty from which it was the object of the rules as to interpleader to free him.

BOWEN, L.J. I am of the same opinion. This is an action against the sheriff for not paying over to the plaintiff costs and expenses to which he was entitled under the bill of sale. The sheriff was directed by the order of the master to pay out of the proceeds of the sale the principal sum due and interest. That was the claim which the plaintiff put forward before the master in his affidavit, and there is no evidence that he put forward any further claim. He, however, requires the sheriff to pay him everything which is justly due under the bill of sale. To hold that he is entitled to this would be to defeat the object of the interpleader, which is, that the master may adjudicate on the questions that arise between the claimants. If a claimant does not put before the master the whole of his claim, but prefers a fresh claim before the sheriff, it would throw on the latter the duty of deciding between the parties, the very thing from which it is sought by the process of interpleader to relieve him. I think, therefore, the appeal must be allowed, and judgment entered for the defendants.

FRY, L.J., concurred.

Appeal allowed.

Solicitors for plaintiff: *Collins & Wilkinson.*
Solicitor for defendants: *W. W. Burchell.*

A. M.

[IN THE COURT OF APPEAL.]

1887
Jan. 14, 17.

EX PARTE FOREMAN. IN RE HANN.

Bankruptcy—Appeal—Amount involved under 50*l.—Leave of Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, *sub-s.* 2 (*d*), 127—*Bankruptcy Rules*, 1883, *r.* 111 (2).

Rule 111 (2) of the Bankruptcy Rules, 1883, which provides that no appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceeding that the money or money's worth involved does not exceed 50*l.*, unless by leave of the Court, was authorized by s. 127 of the Bankruptcy Act, 1883, taken in connection with s. 104, sub-s. 2 (*d*).

Quære, whether, even if a rule was made in excess of the power given by s. 127, it would, after it had been laid before Parliament and issued, acquire the force of a statute under s. 127 (2).

APPEAL against the refusal of a Divisional Court (Cave and Wills, JJ.), to entertain an appeal from a decision of the County Court at Windsor in a bankruptcy matter, on the ground that the amount involved did not exceed 50*l.*, and that leave to appeal had not been given by the county court.

An application made to the county court by the trustee in the bankruptcy, that Mrs. Smith, a creditor, should deliver to the trustee certain goods of the value of 37*l.* 5*s.*, on the ground that the delivery of them to her by the bankrupt shortly before his bankruptcy was a fraudulent preference, was dismissed. Leave to appeal was refused, but, notwithstanding, the trustee appealed to the Divisional Court.

1886. Dec. 6. The appeal being called on for hearing,

H. T. Eve, for the respondent, objected, that no appeal lay, as the amount in question was under 50*l.*: Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104, sub-s. 2 (*d*); Bankruptcy Rules, 1883, r. 111 (2).

Edward Clayton, for the trustee. The rule is ultrà vires. By 46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 104, "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal," but by s. 127 the Lord Chancellor may make, revoke, and alter "general rules for carrying into effect the objects of this Act." One of those objects is to give any

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aggrieved person a right of appeal. The power of making rules only extends to regulate and not to restrict the right of appeal. If the rules can restrict it to 50*l.*, they might equally restrict it to 10,000*l.* By s. 23 of the Bankruptcy Act, 1869, a trustee in bankruptcy might disclaim leaseholds of the bankrupt, and rule 28 of the Rules of 1871 provided that he should not disclaim without leave of the Court. In *Reed* v. *Harvey* (1) Lush, J., questioned whether the rule could qualify s. 23, and, although deciding that the rule only regulated the conduct of the trustee as between him and the Court, added (2), "If it had in terms gone further, we should have been prepared to hold that it was ultrà vires, being inconsistent with the enactment of the statute itself." So here, the rule is inconsistent with the Act. The authority of *Reed* v. *Harvey* (1) has been, as it were, confirmed by the legislature enacting in the Bankruptcy Act, 1883, itself—and not by rules—that the trustee shall not disclaim without leave of the court. The legislature has deputed to the Lord Chancellor a power to make rules under the Act, and this power cannot be exceeded.

CAVE, J. I am of opinion that the objection taken cannot prevail. The object of the Act 46 & 47 Vict. c. 52, is fairly clear with respect to the power to make rules. Sect. 104 giving the right to appeal contains this very reasonable proviso, viz. "(*d.*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal," which indicates that there may be rules made preventing an appeal from being entertained. By s. 127 the general rules are to be laid before Parliament, "and shall be judicially noticed, and shall have effect as if enacted by this Act," again a very reasonable provision. So in fact there is given to the rules the same effect as if they were enacted by the Act. Sub-sect. (4) provides "that the said general rules so made, revoked, or altered, shall not extend the jurisdiction of the Court," but says not a word about limiting it. Then rule 111 begins with a provision that (1.) "Except by leave of the Court there shall be no appeal to the Court of Appeal from any order made by

(1) 5 Q. B. D. 184. (2) 5 Q. B. D. at p. 186.

consent, or as to *costs* only." If one part of that rule is ultrà vires the whole is, and consequently it would be ultrà vires to put any restriction on the matter of costs, and if the registrar in his discretion dismissed an application for 2*s.* 6*d.* costs, there might be an appeal on the question whether he ought to have done so. The proposition would lead to such consequences as make it absolutely impossible to suppose that the legislature could have intended that there was to be an appeal under all circumstances from the county court in bankruptcy. I think that the legislature is laying down in the Act the general principle of appeal subject to rules. The passage in *Reed* v. *Harvey* (1) relied on by the learned counsel in this case was merely a dictum, and the Court did not hold the rule there in question to be ultrà vires. It is clear that the rule to which objection is now raised is not contrary to the intention of the legislature, and I am satisfied that the legislature intended that the procedure as to appeal should be regulated by general rules which have been duly made, and the appellant cannot bring himself within them.

WILLS, J., concurred.

J. R.

Dec. 8. The Court of Appeal gave leave to appeal.

1887. Jan. 14. *Edward Clayton*, for the appellant. First, sub-s. 2 of rule 111 of the Bankruptcy Rules, 1883, which were in force when the notice of appeal to the Divisional Court was given, is ultrà vires and void, or in any case it did not apply to an appeal from a county court to the Divisional Court. The power to make general rules is conferred by s. 127 (2) of the

(1) 5 Q. B. D. 184.

(2) Sect. 104 provides: "(2.) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:

"(*a.*) An appeal shall lie from the order of a county court to her Majesty's Court of Appeal:

"(*d.*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal."

Sect. 127 provides, "(1.) The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act.

"(2.) All general rules made under the foregoing provisions of this section shall be laid before Parliament within

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Bankruptcy Act, 1883, and that power is to make rules "for carrying into effect the objects of this Act." Sub-s. 2 of rule 111 does not carry into effect the objects of the Act; on the contrary, it purports to take away from some persons the right of appeal which is given by sub-s. 2 of s. 104 of the Act to all persons aggrieved. Sub-s. 2 (*d*) of s. 104 refers only to rules regulating the time and mode of bringing an appeal, not to rules affecting the right of appeal itself. Sub-s. 2 of rule 111 purports to impose a condition with which it may not be in the power of the appellant to comply. He has no control over the county court judge. The rule might equally well have said, that there shall be no appeal in any case whatever, or no appeal if the amount involved is less than 10,000*l*. That would practically prohibit appeals altogether. If s. 127 had conferred a general power to modify by general rules the provisions of the Act, it would have been unnecessary to provide, as s. 121 does, that, in the case of small bankruptcies, the general provisions of the Act shall be subject, not only to certain specified modifications, but also to "such other modifications as may be prescribed by general rules:" *Ex parte Dale.* (1) In *Reed* v. *Harvey* (2), where the

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three weeks after they are made, if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

"(3.) Such general rules as may be required for purposes of this Act may be made at any time after the passing of this Act.

"(4.) Provided always, that the said general rules so made, revoked, or altered, shall not extend the jurisdiction of the Court.

"(5.) After the commencement of this Act no general rule under the provisions of this section shall come into operation until the expiration of one month after the same has been made and issued."

Rule 111 of the Bankruptcy Rules, 1883, provides: "(1.) Except by leave of the Court there shall be no appeal to the Court of Appeal from any order made by consent, or as to costs only.

"(2.) No appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l*., unless by leave of the Court."

Sub-s. 2 of rule 129 of the Bankruptcy Rules, 1886 (which came into operation on October 25, 1886), is substantially to the same effect as sub-s. 2 of rule 111 of the Bankruptcy Rules, 1883.

(1) 33 W. R. 476.

(2) 5 Q. B. D. 184.

question arose upon rule 28 of the Bankruptcy Rules of 1871, Lush, J., said that if the rule had been intended to do more than regulate the conduct of the trustee as between himself and the Court, it would have been ultrà vires, as being inconsistent with the enactment of the statute. The Bankruptcy Act, 1883, has given a statutory confirmation to that view of rule 28, for the condition that the trustee shall not disclaim a lease without the leave of the Court, is now inserted in the Act itself: s. 55 (3). The power to make general rules which was conferred by s. 78 of the Bankruptcy Act, 1869, was larger than the power conferred by s. 127 of the Bankruptcy Act, 1883, for s. 78 provided that "any rules so made shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if they were enacted in the body of this Act." If sub-s. 2 of rule 111 is invalid, it does not follow that sub-s. 1 is also invalid, for, by s. 105 of the Act, costs are to be in the discretion of the Court. If a rule never can be invalid when once it has been laid before Parliament, the Act might be practically repealed by the rules.

Secondly, the effect of the Bankruptcy Appeals (County Courts) Act, 1884, is to repeal sub-s. 2 of rule 111, if it ever had validity, as regards appeals from county courts to the Divisional Court. Sect. 2 of that Act provides that "sect. 104, sub-s. 2 (*a*) of the Bankruptcy Act, 1883, is hereby repealed, and instead thereof it is hereby enacted that an appeal shall lie in bankruptcy matters *at the instance of any person aggrieved*, from the order of a county court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned shall for the purpose of hearing any such appeal be a member." That gives an unqualified right of appeal to *any person* aggrieved by the decision of a county court.

H. T. Eve, for the respondent. First, as to the effect of the Act of 1884, that Act came into operation on April 28, 1884, and rule 2 (*a*) of the Bankruptcy Rules which were issued on April 11, 1884, and which could not, therefore, come into force for a month, i.e., not until after April 28, 1884, provided that "In the Bankruptcy Rules, 1883, the term 'Court of Appeal' shall be deemed to include any Court to which under any Act for the time

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being in force appeals shall lie from the Court as defined by the Bankruptcy Act, 1883, and the said rules."

[He was stopped by the Court on this point.]

Secondly, as to the validity of sub-s. 2 of rule 111, sect. 127, taken in conjunction with sub-s. 2 (*a*) of s. 104, gave authority to make it. At any rate, s. 127 gives to the Rules when they have been laid before Parliament and issued, i.e., published in the *Gazette*, the force of a statutory enactment, and the Court cannot then inquire whether they were in excess of the authority. The rules cannot come into operation until they have been laid before Parliament; the words "shall have effect," in sub-s. 2 of s. 127, mean "shall *then* have effect," i.e., after they have been laid before Parliament.

Cur. adv. vult.

Jan. 17. Lord Esher, M.R. The question raised in the county court was, whether a payment which had been made by the bankrupt was a fraudulent preference. The amount involved did not exceed 50*l*. The county court judge refused to set aside the payment, and an appeal was presented to the Divisional Court, which was constituted as a Court of Appeal from the county courts by the Bankruptcy Act of 1884. The Divisional Court dismissed the appeal, without entering into the merits, on the ground that no leave to appeal had been given by the county court, and that, therefore, by virtue of sub-s. 2 of r. 111, of the Bankruptcy Rules, 1883, which were then in force, the Divisional Court had no power to entertain the appeal.

The present appeal raises the question whether an appeal did lie to the Divisional Court. The case was argued before us with very great ability, and several important points were raised. On the one side it was said, that there has been nothing to take away the right of appeal which is given by sub-s. 2 of s. 104 of the Bankruptcy Act, 1883. It was not denied that rule 111 was made by the Lord Chancellor, with the concurrence of the President of the Board of Trade, or that (with the exception of one minor objection) it does in terms include the present case, but it was argued that the rule was ultrà vires. The minor objection was this —that the rule did not apply to an appeal to the Divisional Court,

which Court was not created as a Court of Appeal by the Bankruptcy Act, 1883, but by the Bankruptcy Act of 1884. But sub-s. 2 (*a*) of s. 104 of the Act of 1883 was repealed by the Act of 1884, and the Divisional Court was substituted for the Court of Appeal as the Court of Appeal from county courts in bankruptcy matters. That is the sole effect of the Act of 1884, and, that substitution being made, every enactment of the Act of 1883 and of the rules made under it, which was applicable to bankruptcy appeals from county courts to this Court, applies to bankruptcy appeals from county courts to the new Court of Appeal constituted by the Act of 1884.

The real question, therefore, is, whether sub-s. 2 of rule 111 was or was not ultrà vires. On behalf of the respondent it was argued that the rule was authorized by sub-s. 2 (*d*) of s. 104 and s. 127 taken together. And it was further suggested, that, even though the rule might be said to go beyond the authority which is given to make rules, yet, inasmuch as the rule was clearly made by the Lord Chancellor with the intent of "carrying into effect the objects of the Act," and was laid before Parliament, this Court cannot inquire into the competency of the Lord Chancellor to make it, but that, by virtue of sub-s. 2 of s. 127, the rule was equivalent to an Act of Parliament, as to the propriety of which this Court was not entitled to express any opinion. The latter point is clearly one of the first importance, though of course it depends on the construction of the particular words of s. 127. It seems to me, however, that it is unnecessary now to express any opinion upon the point, and I shall abstain from doing so.

It cannot be denied that the present case comes within the terms of sub-s. 2 of rule 111. That rule was made by virtue of the powers conferred on the Lord Chancellor by s. 127, which is headed "General Rules." Then we must look at s. 104, and see whether the regulation of the right of bringing appeals was or was not one of the objects of the Act. Sub-s. 2 (*d*) of s. 104, says that "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal." That, as it seems to me, assumes that there may be general rules from time to time in force in relation to the bring-

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ing of appeals. Whence are such rules to be derived? It seems to me that they can only be derived from the power which is given by s. 127 to the Lord Chancellor, with the concurrence of the President of the Board of Trade, from time to time "to make, revoke, and alter general rules for carrying into effect the objects of this Act." I think, therefore, that sub-s. 2 of rule 111 was authorized by s. 127, as applied by sub-s. 2 (*d*) of s. 104. It is, therefore, unnecessary to consider the second point. I will only add, that, whenever the objection is taken that a general rule made by such a great judicial officer, with the concurrence of a great officer of state, is ultrà vires, it will be necessary for the Court, if it has to decide the point, to look at the rule with extreme care, and we should be strongly inclined to the view that such high functionaries had not exceeded their authority, though, of course, if we thought that they had, we should be bound to say so. In the present case I think that they have not gone beyond their authority.

Bowen, L.J. The question raised in this case is one of the greatest importance.

It is argued, in the first place, that sub-s. 2 of rule 111 is invalid, because it imposes a restriction on the right of appeal which is not to be found in the Act, and which is not within the scope of the authority given by the Act to the framers of the rules. It is said that, while the rules may well impose on an appellant a condition with which it is in his power to comply, it would be going beyond the authority given to frame rules to impose a condition with which it is not in the appellant's own power to comply. Consequently, a regulation as to the time within which an appeal must be brought, which would leave it to the appellant's option whether he would comply with it or not, would be within the authority; but the imposition of a condition with which it would be impossible for the appellant to comply, except with the consent of another person over whom he has no control, would really be making an alteration in the right of appeal given by the Act, and would therefore be beyond the scope of the authority.

Two answers have been given to this objection. (1.) It was said that, the rule having been in fact made by the Lord Chancellor, with the concurrence of the President of the Board of Trade, and laid before Parliament and issued, it must be taken to have been validly made under the authority to frame rules; that the effect of sub-s. 2 of s. 127 is to clothe the rules, when they have been laid before Parliament and issued, with legislative authority, and that the Court cannot then go behind them and examine into the scope of the authority under which they purport to have been made.

(2.) It was argued that it would not be a correct interpretation of sub-s. 2 (*d*) of s. 104 to say that the power to make rules is fettered by the ordinary restrictions on such a power, but that sub-s. 2 (*d*) of s. 104 goes far beyond the ordinary scope of such a power, and authorizes the framers of the rules in some sense to limit the right of appeal itself.

With regard to the first answer, I desire to give no opinion now, beyond expressing my concurrence in what the Master of the Rolls has said. I desire to reserve my opinion, until it shall become necessary to decide the point, whether a rule once laid before Parliament and issued can be impeached on the ground that it was ultrà vires.

I think the true construction of sub-s. 2 (*d*) of s. 104 is, that it goes beyond the ordinary power to make rules regulating the exercise of a right given by the Act, and clothes the Lord Chancellor, acting with the concurrence of the President of the Board of Trade, with an authority to touch the right of appeal itself. If it had been intended only to give a power to make rules for carrying out that right of appeal which is given by sub-ss. 2 (*a*) and (*b*) of s. 104, I think that sub-s. 2 (*d*) would not have been required at all, for that power was already conferred by s. 127. Ought we to suppose that sub-s. 2 (*d*) of s. 104 is superfluous, and mere waste language, or ought we not rather to give to it the construction which has been insisted upon by the respondent? I think the language of sub-s. 2 (*d*) of s. 104 is not very felicitous, but, looking at the whole scope of the Act, and applying the cogent argument that that sub-section would otherwise have been

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superfluous, I think the framers of the rules were not only empowered to regulate the exercise of the right of appeal, but were enabled to say within what limits as to amount the right of appeal should be confined.

FRY, L.J. I am of the same opinion, and I base my decision entirely upon sub-s. 2 (*d*) of s. 104, which we are bound to read in connection with s. 127. I cannot think that sub-s. 2 (*d*) was intended to be a mere repetition of the power conferred by s. 127; in my opinion, we must give it some greater and wider force. It appears to me that it was perfectly within the power of the framers of the rules, if they had been acting merely under s. 127, to make a rule regulating the time within which an appeal must be presented. I think, however, that sub-s. 2 (*d*) of s. 104 is not limited to that, but that it enabled the Lord Chancellor, with the concurrence of the President of the Board of Trade, to place a fetter on the right of appeal itself, and to impose a limit on the amount in respect of which an appeal may be brought.

Appeal dismissed with costs.

Solicitors for appellant: *Thomson & Ward.*

Solicitor for respondent: *J. J. Chapman, for Long, Durnford, & Lovegrove, Windsor.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Jan. 13.

THE OWENS COLLEGE, APPELLANTS; THE OVERSEERS OF CHORLTON-UPON-MEDLOCK, RESPONDENTS.

Poor-rate—Rateable Value—Premises inalienably vested in Trustees for Statutory Purposes—Estimate of Rental—Possible Tenant—Statutory Disability to rent Premises.

Trustees were incorporated under an Act of Parliament for the purpose of establishing and for ever maintaining a college for educational purposes. They were by the Act empowered to acquire and hold land as a site, and to erect buildings thereon for the college; and they had no power to sell or let the land so acquired. In pursuance of the Act they purchased land in fee simple and erected buildings upon it, which they used for the purposes of such college. Such an institution as the college could not be carried on at a profit in the locality, as the expenses would always exceed the amount to be derived from students' fees. The college premises having been rated to the poor-rate on a gross estimated rental of 3833*l.*, it was found, in a case stated on appeal against the rate, that, if let for any purposes to which (without considerable structural alterations) they were capable of being applied, they would not let for more than 1300*l.* per annum, which would make the rateable value 1083*l.* 6*s.* 8*d.* The trustees were willing to be rated on that rateable value, but contended that they were not liable to be rated on any larger amount. In arriving at this amount the trustees themselves were not taken into consideration as possible tenants of the premises:—

Held, that (assuming the trustees to be rateable upon more than a nominal amount) in estimating the rental the trustees, being unable themselves to rent the premises by virtue of the statutory provisions, must be excluded from consideration as possible tenants, and therefore the rateable value must be reduced to 1083*l.* 6*s.* 8*d.*

The Queen v. *School Board for London* (17 Q. B. D. 738) explained and distinguished.

APPEAL from the judgment of the Queen's Bench Division upon a case stated under 12 & 13 Vict. c. 45, s. 11, on appeal against a poor-rate.

The appellants were the governors of Owens College, Manchester, who had been incorporated under the name of "The Owens College," pursuant to the Owens Extension College Manchester Act, 1870, and the Owens College Act, 1871. The respondents had assessed the college to a poor-rate upon a gross estimated rental of 3833*l.* and a rateable value of 3285*l.* The property rated consisted of certain land acquired by the appellants by

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purchase under the 9th section of the Owens Extension College Manchester Act, 1870, as a site for the college and college buildings erected and provided by them under the 10th section of that Act. It appeared from the recitals of the Act that there was at the date of the Act an existing educational institution known as the Owens College, founded under the will of John Owens, merchant, of Manchester, and by the Act provision was made for the establishment and maintenance for ever of a college wherein young persons might receive instruction in such branches of learning and science as are usually studied at the English universities, and its amalgamation with the previously existing college under the corporate name of Owens College: and the governors were by the Act empowered to acquire and hold land as a site for the college. The governors of such college were also authorized by the Act to hold lands in addition to those for the time being forming the site of the college, not exceeding at any one time 200 acres. They were also empowered to grant leases of any parts of the lands for the time being vested in them, "except the site of the college and its appurtenances," and to sell, exchange, or otherwise dispose of any lands vested in them, "and not being the site or part of the site of the college, and not being otherwise required for the purposes thereof."

The college and its appurtenances had been erected and were maintained by the appellants under the provisions of their Acts and the will of John Owens as a college for the education of young persons in such branches of learning and science as are usually taught in the English universities. The land forming the site of the college and its appurtenances was purchased by the appellants for 25,774*l.*, and the college buildings had been erected at a cost of 125,245*l.* The site and buildings were stated by the case to be well suited for the purposes to which they were applied, the latter having been designed and erected for the express purpose of providing the requisite accommodation for an extensive college affording education of the kind usually provided in English universities. The expenses of the college were defrayed partly from endowments and partly from fees received from students; but the college could not be carried on as a collegiate institution at a profit, in a commercial sense, to the

proprietors, as the annual expenses of such an institution in the locality, whether subject to the special conditions and restrictions imposed by the Acts or not, would always considerably exceed the amount to be derived from students' fees. It was found in the case that the college buildings having been constructed and arranged with a special view to their present uses were adapted only for such or analogous uses; that if (not being wanted by their present owners) they and the land on which they stood were in the market to be let to a solvent tenant from year to year, they would not command, if their use was restricted to educational purposes, a gross rental of more than 1000*l.* per annum, and their rateable value on that basis would not exceed 833*l.* 6*s.* 8*d.*; and that, if let for any purposes to which (without considerable structural alterations) they were capable of being turned, they would not let for more than 1300*l.* per annum gross annual rental, and their rateable value on that basis would not exceed 1083*l.* 6*s.* 8*d.*

The case further stated that the site of the college prior to its purchase by the appellants was covered with property the gross rental of which was about 1271*l.*; and the appellants (although they contended that, as a matter of law, they should be rated at a nominal sum, inasmuch as the college buildings were incapable of yielding a profit, if occupied for their existing purposes and under the conditions to which the appellants were subject) were willing to be rated on the gross estimated rental of 1300*l.* abovementioned, and at a rateable value of 1083*l.* 6*s.* 8*d.*; and they further contended that (if rateable at anything beyond a nominal amount) they ought not to be rated on any greater gross estimated rental than 1000*l.*, or in the alternative, 1300*l.*

The respondents contended that the value to be ascertained was the existing value of the occupation to the existing occupiers, and that, in the case of property in the actual occupation of a tenant for whose peculiar wants it has been constructed, it is erroneous in estimating the value to exclude from view the needs of the actual tenant, and to inquire what rental the property would command if that actual tenant no longer required it.

The question for the opinion of the Court was whether either of the contentions of the appellants as to the principles upon which the college buildings and their appurtenances should

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be rated was correct; if the Court answered the question in the affirmative, then the gross estimated rental was to be reduced to 1300*l.*, and the rateable value to 1083*l.* 6*s.* 8*d.*; but if they answered it in the negative, the rate was to remain unaltered.

The Queen's Bench Division gave judgment in favour of the appellants.

Hopwood, Q.C., and *Coghill*, for the respondents. It is clear that in arriving at the rental of 1300*l.* the appellants themselves have not been considered as possible tenants of the college buildings. It was decided in *Reg.* v. *School Board for London* (1) that, in assessing to the poor-rate schools occupied by a school board, which can make no profit in a commercial sense as tenant of the schools, the school board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the board might reasonably be expected to give for the premises for use as schools. The contention of the appellants that the premises cannot be rated on a larger rental than that which any person other than the governors would give is incorrect, and the rate must stand unaltered (2).

Henn Collins, Q.C., and *Smyly*, for the appellants. The governors of the college cannot be considered as possible tenants of these premises. It is not intended by the Acts that the governors should rent a site for the college. The Acts contemplate that land once acquired for the purposes of a site for the college shall be held inalienably for that purpose, and, by necessary implication from the provision enabling the governors to sell or let other lands, they cannot sell or let this land. It is impossible, therefore, when once the governors have become owners of the land for the site of the college, to consider them as possible tenants of such site.

Hopwood, Q.C., in reply.

LORD ESHER, M.R. It seems to me that the case really raises the question at which of two valuations the appellants ought

(1) 17 Q. B. D. 738.

(2) The question was raised in argument whether the appellants were, upon the facts of the case, exempt from rateability, or, at any rate, only liable to be rated upon a nominal amount; but the arguments with regard to that point are omitted, as the Court gave no judgment upon it.

to be rated. We are given the opportunity no doubt of deciding whether the appellants are not rateable or only rateable at a nominal sum, because of course, if we so held, that would be ground for deciding that they are not liable to be assessed at the larger amount; but in our opinion it does not become necessary to decide that question, the appellants being willing to be assessed on a gross estimated rental of 1300*l*. It appears to me clear that in arriving at that figure the arbitrator who stated the case leaves out of consideration what the appellants would give as a rental for the site and buildings if they wanted to become tenants of them. In that case, as they have important statutory duties to perform, to which such a site and buildings are essential, it may probably be assumed that they would give more than any one else. Therefore, if they could be considered as possible tenants, inasmuch as that consideration has been omitted, the valuation would be wrong. The test for the determination of this case therefore seems to be whether we think they could legally be tenants of this site for the purposes of the Acts; for, if they could not, can it be right to say that what they would give for rent should be taken into account: or, in other words, if they cannot be tenants, ought they not to be excluded from the class of possible tenants of the premises? In determining this question I need not go through all the provisions of the Acts. There may not be any express prohibition against their taking lands as tenants for the purpose of a site, but in considering the question it must be borne in mind that, being a statutory corporation created and existing only for the statutory purposes, they can only have the powers given to them by their Acts. It seems to me that, on looking at the various provisions of the Acts, it appears by necessary implication that the governors could not become tenants of any site for the purposes of the college, but that the only site they were authorized to take was one which they were to acquire as owners in fee simple. If so, it appears to follow that they ought not to be taken into consideration as hypothetical tenants. Can it be supposed that the governors are seeking to become tenants of a site, when the Act of Parliament says that they cannot be tenants? It seems to me that the proposition involves the answer to it. I abide by the view

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which I had in my mind in the case of *Reg.* v. *School Board for London.* (1) What I decided there was, that the school board ought to be taken into consideration as a possible tenant, because the school board could be tenant of the premises, and as I said, as a necessary corollary from that, if by the terms of any statute it could not legally be tenant, it would be excluded from the calculation. If the parties rated can be tenants, then I think they must be taken into account as hypothetical tenants; but, if they cannot by reason of statutory disability, I cannot see any escape from the conclusion that it is impossible to take them into consideration. That is all that it seems to me necessary to decide for the purposes of this case. I do not say what might be the result if we had to go further and consider whether persons other than the appellants could be considered as tenants, and, if so, on what principle the rent which such other persons must be considered likely to give would have to be determined. The sole ground on which I put my judgment is, that the arbitrator who stated the case was right in excluding from his calculation of the rent for which the premises might be expected to let the rent which the appellants might be expected to give. For these reasons I think this appeal should be dismissed.

BOWEN, L.J. I agree. In this case the site of the college buildings has been purchased by the appellants who are a statutory corporation. It appears to me unnecessary to consider whether they had originally power to rent a site. They have purchased one, and they can neither sell nor let it, but must continue to occupy it for the statutory purposes. They are a statutory corporation, and the powers and disabilities of such a corporation must depend entirely on the statute itself. Looking at the provisions of the Acts by which the appellants are incorporated, it appears to have been intended that the powers of sale and leasing should be confined to those expressly given, which exclude the power of letting or selling the site of the college. That being so, how does that state of things affect the question of rating the site? We have, by the terms in which the case is stated, to see whether there are any materials for holding

(1) 17 Q. B. D. 738.

that the premises ought to be rated more highly than upon a rental of 1300*l*. The basis of rating is by the Parochial Assessment Act declared to be an estimate of the net annual value of the hereditament, that is to say of the rent at which the same might reasonably be expected to let from year to year subject to certain deductions. It is not necessary here, as the case is stated, to consider what is to happen in the case of premises which never could be let at any rent. The estimate of the annual value of the hereditaments is to be based on the rent at which they might reasonably be expected to let. Consequently, while on the one hand you are not to consider what an unreasonable person might possibly give, on the other hand you may take into account the consideration that persons having statutory functions to perform, for which the premises are essential, would compete for the tenancy. If any class of persons, whether bound by statute to obtain the use of such premises or not, may reasonably be expected to rent the premises, then the existence of such persons must be taken into account. That seems to me to be the effect of what was said in *Reg.* v. *School Board of London.* (1) The motives with which the premises are desired it is not material to consider. The material question is whether such persons want the premises and what rent they would be likely to give. Then we have to consider whether the Governors of Owens College are to be excluded from the category of possible tenants. It seems to me that they ought to be excluded from the class of persons who might reasonably be expected to give a rent for the premises, because they cannot, as matters stand, ever become tenants of the premises for the purposes of a site for the college; a fetter is already imposed upon them and they can never now hold the premises except as owners in fee simple. Assuming, therefore, that the premises are rateable on the basis of a rental that might be obtained for them, it is necessary to consider what rent persons other than the governors of Owens College might reasonably be expected to give for them. I think myself that that question ought to be considered on the footing that the other persons are fettered in their use of the premises by restrictions such as those existing under the Acts of Parliament applying to the

(1) 17 Q. B. D. 738.

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Bowen, L.J.

appellants: and that it is not reasonable to expect that any rent could be obtained except such rent as the premises might command as affected by the statutory conditions. It seems to me, therefore, that, in considering what a possible tenant might give, it ought to be assumed that he is to be tenant of the premises in the state in which the Act says they are to remain. I do not mean to say, in deciding this case as I do, that the existence of Owens College is to be excluded from consideration in estimating the rental in any other sense than as meaning that the appellants cannot be considered as being in a position to rent the premises themselves. So far as the existence of Owens College might otherwise affect the rent which another reasonable tenant would be likely to give, I do not wish to decide that its existence ought not to be taken into consideration. As to that I express no opinion. But, even treating the annual value as to be determined by the rent which a possible tenant other than Owens College would give for the premises, the arbitrator who has stated the case has found the respondents out of court with regard to that; because he has found that no other tenant would give a rent of more than 1300*l.* for the premises as they exist for any purpose; and the appellants do not seek to reduce the assessment below that figure.

FRY, L.J. The appellants support their appeal against the rate by two arguments. One of their arguments is that, by reason of the restrictions imposed in respect of this land by the statutes relating to Owens College, it could not be supposed that there would be any tenant of the premises at all. I do not propose to go into that question. The second argument was of a narrower description. It was said that, as the appellants were incapable of hiring premises for the purposes of their Acts, any rent they would be likely to give could not be taken into consideration, because a body that is prohibited from hiring premises cannot be considered as a possible tenant of such premises. The question, therefore, seems to me to be whether the governors are prohibited by their statutes from hiring a site for the college. It appears to me, on looking to the recitals of the Act of 1870, that it contemplated the foundation not of an institution that

could be carried on in a hired building, but of a college to be established and maintained for ever for the purposes of education. For such purposes it enables the corporation established thereby to acquire and hold land and erect buildings thereon. I think the whole language points to a permanent institution and structure. The matter seems to me to be made still more plain by the Act of 1871. After the passing of the Act of 1870, the governors under that Act acquired the piece of land in question, and it was agreed between the trustees of Owens' will and the governors, that the original Owens College established under the trusts of Owens' will should be amalgamated with the new institution, and that the lands so purchased should be made over to the body to arise on the fusion of the two institutions. The Charity Commissioners incorporated that agreement in a scheme made by them with regard to the matter, and by the Act of 1871 that scheme received the sanction of the legislature. It seems to me that the result is that the land is dedicated for ever as the site of a building for the college, and that the appellants are incapable of hiring that land for the purposes of the college, and therefore that the contention is well founded that, being prohibited from hiring the land, they cannot be taken into consideration as possible tenants. Therefore I think that the case can be decided upon the narrower of the two arguments put forward, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Bower, Cotton & Bower, for J. P. Aston, & Harwood.*

Solicitors for respondents: *Hopwood & Sons.*

E. L.

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Dec. 4.

HERSANT, Appellant; HALSE, Respondent.

Parliament—Borough Vote—Lodger Franchise—Old Lodgers List—Claim to be registered—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 4, *s.* 30, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 24, *s.* 28, *sub-s.* 6—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15).

The claim to be registered is an essential part of the qualification for the lodger franchise.

The voter was on the old lodgers list of voters for a borough for 1885. He made no claim to be registered for 1886: but the overseers, instead of causing the old lodgers list for that year to be printed de novo from the claims served upon them, caused it to be printed from a copy of the old lodgers list in the current register, from which they intended to erase the names in respect of which no claims had been received. They had, however, omitted to erase the name of the voter, and failed to discover the mistake before the list had been signed and published:—

Held, that the voter was not entitled to have his name retained in the list for 1886.

Case stated by the revising barrister for Middlesex.

The appellant duly objected to the name of William Henry Humphrey being retained on the old lodgers list for the South Division of the borough of St. Pancras, on the ground that he had not claimed to be registered, in manner provided by s. 22 of 41 & 42 Vict. c. 26.

It appeared that Humphrey had made no claim of any kind, but that his name had been inserted in the list by a mistake which had arisen as follows:—The overseers, in making out the list, instead of causing it to be printed de novo from the old lodger claims served upon them, had caused it to be printed from a copy of the lodgers list contained in the current register for the division, from which copy they had erased, or intended to erase, those names in respect of which no claims had been received. They had, however, omitted to erase the name of Humphrey, which was on the said register, and failed to discover their mistake before the old lodgers list had been signed and published.

It was contended on behalf of the appellant that the principle established by *Davies* v. *Hopkins* (1) and *Leonard* v. *Alloways* (2)

(1) 27 L. J. (C.P.) 6; K. & G. 118. (2) 48 L. J. (C.P.) 81.

did not apply to lodgers,—1. Because by 30 & 31 Vict. c. 102, s. 4, the making of a claim was an indispensable part of the qualification for the lodger franchise,—see *Cullen* v. *Patterson* (1),—2. Because by s. 30, sub-s. 2, of the same Act, lodger claimants were placed in the same position as to proof of claims as claimants omitted from the overseers' lists of voters, and consequently they were subject to the law laid down in *In re Sale* (2),—3. Because the decisions in *Meade* v. *Cooper* (3), *Mathews* v. *Magrath* (4), and *Edwards* v. *Lang* (5), were inconsistent with *In re Sale* (2), and ought not to be followed: and that consequently the revising barrister ought to admit the evidence and expunge the name of Humphrey.

The revising barrister held that it was not competent to him to require proof of the making of a claim by Humphrey, on the grounds,—1. That, though it might be admitted that *In re Sale* (2), applied to the lodgers list as existing before the 41 & 42 Vict. c. 26, and to the new lodgers list as existing since, yet that the old lodgers list was by s. 22 of the last-cited Act to be deemed a list of voters, and was thereby brought within the principle of *Davies* v. *Hopkins* (6) and *Leonard* v. *Alloways* (7),—3. That, besides the reasons given in *Davies* v. *Hopkins* (6), there was an additional reason for refusing to go behind the list in the case of an old lodger, viz. that he might by seeing his name in the list have been deterred from making a valid claim in time to be entered on the register as a new lodger. He accordingly rejected the evidence, and retained the name of Humphrey on the old lodgers list.

The question for the decision of the Court was, whether the revising barrister ought to have required proof of the making of a claim by Humphrey. If that question was answered in the affirmative, the register was to be amended by erasing his name from the old lodgers list.

Bompas, Q.C., for the appellant. By s. 22 of 41 & 42 Vict. c. 26, where a person is entered in respect of lodgings on the

(1) 18 Law Rep. (Irish) 274.
(2) 50 L. J. (C.P.) 113.
(3) 1 Ir. Rep. (R. & L. App.) 12.
(4) 1 Ir. Rep. (R. & L. App.) 14.
(5) Ibid. 24.
(6) 27 L. J. (C.P.) 6; K. & G. 118.
(7) 48 L. J. (C.P.) 81.

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register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July. The duty of the revising barrister is defined by s. 28, sub-s. 3 of which provides that "he shall expunge the name of every person, whether objected to or not, whose qualification as stated in any list is insufficient in law to entitle such person to be included therein." His right to be placed on the register, in the case of a lodger, depends upon his being brought within s. 4 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), which enacts that "every man shall be entitled to be registered as a voter, and when registered to vote for a member of parliament for a borough, who is qualified as follows" . . . "(2.) As a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house and of the clear yearly value, if let unfurnished, of 10*l.* or upwards; (3.) Has resided in such lodgings during the twelve months immediately preceding the last day of July, and *has claimed to be registered* as a voter at the next ensuing registration of voters." The claim is an essential part of the qualification: this was so held by the Irish Appeal Court, upon similar words in the Irish Registration Act, 1868 (31 & 32 Vict. c. 49, s. 4), and in s. 4 of the Representation of the People Act (Ireland) Act, 1885 (48 & 49 Vict. c. 17), in a case of *Cullen* v. *Patterson.* (1) That case was followed by *In re Sale* (2), and is distinguishable from the cases of *Meade* v. *Cooper* (3), *Mathew* v. *Magrath* (4) and *Edwards* v. *Lang* (5), which were supposed to be at variance with it.

R. Bray, for the respondent. It must be taken that Humphrey was duly qualified provided he had claimed to be put on the lodgers list. The question is whether the absence of a claim

(1) 18 Law Rep. (Irish) 274.
(2) 50 L. J. (C.P.) 113.
(3) 1 Irish (Registration and Land App.) 12.
(4) 1 Irish (Registration and Land App.) 14.
(5) Ibid. 24.

disqualifies him from being registered. The overseers having put him upon the list, their act is conclusive. The revising barrister has no power to go behind the list: *Davies* v. *Hopkins*. (1)

[POLLOCK, B. All that *Davies* v. *Hopkins* (1) decides is, that the overseers may waive an irregularity in the notice of claim. But here they had no business to insert the name of Humphrey in the list at all.]

The course of proceeding as regards the old lodgers list is now regulated by Part II., Third Schedule, rule 30, of the Act of 1885, 48 & 49 Vict. c. 15. The argument urged in this case would have equally applied in the case of *Davies* v. *Hopkins*. (1) The point was virtually decided in the three Irish cases. In *Cullen* v. *Patterson* (2), the claim was to be registered as a householder, not as a lodger.

Bompas, Q.C., was not called upon to reply.

LORD COLERIDGE, C.J. I am of opinion that the revising barrister in this case was wrong. It appears to me that it is an essential part of the qualification of a lodger that he should claim to be registered. Sect. 4 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, enacts that "every man shall be entitled to be registered as a voter, and when registered to vote for a member or members to serve in parliament for a borough, who is qualified as follows," . . . "(2.) As a lodger has occupied in the same borough separately as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house and of a clear yearly value if let unfurnished of 10*l.* or upwards: (3.) Has resided in such lodgings during the twelve months immediately preceding the last day of July, and *has claimed* to be registered as a voter at the next ensuing registration of voters." Sect. 30, sub-s. 2, enacts that "the claim of every person desirous of being registered as a voter for a member or members to serve for any borough in respect of the occupation of lodgings shall be in the form numbered 1 in sched. (G.), or to the like effect, and shall have annexed thereto a declaration in

(1) 3 C. B. (N.S.) 376; 27 L. J. (C.P.) 6.
(2) 18 Law Rep. (Irish) 274.

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the form and be certified in the manner in the said schedule mentioned, or as near thereto as circumstances admit; and every such claim shall after the last day of July and on or before the 25th of August in any year be delivered to the overseers of the parish in which such lodgings shall be situated, and the particulars of such claim shall be duly published by such overseers on or before the 1st of September next ensuing in a separate list according to the form numbered 2 in the schedule," &c. That Act, therefore, gives the franchise to lodgers who have claimed to be registered: and this enactment is further explained (in the case of old lodgers) by s. 22 of 41 & 42 Vict. c. 26, which enacts that, "where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July." Sect. 28 enables the revising barrister (sub-ss. 1 and 2) to correct any mistake in any list or in any claim or notice of objection; and sub-s. 6 provides that he shall expunge the name of every person, whether objected to or not, whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property if the qualification is in respect of property, or any other particulars respecting whom by law required to be stated in the list is or are either *wholly omitted* or in the judgment of the revising barrister insufficiently described for the purpose of being identified, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of the revising barrister before he shall have completed the revision of the list in which the omission or insufficient description occurs. The claim, therefore, in the case of a lodger is clearly part of the qualification. But, inasmuch as there are old lodgers and new lodgers, the Registration Act, 1885 (48 & 49 Vict. c. 15), has provided a new form applicable to the new state of things. Here, Humphrey has not claimed to be inserted either in the new or the old lodgers list. The overseers, by mistake, instead of causing the list to be printed from the old lodger claims served upon them, caused it to be printed from a copy of the lodgers list in the

current register, and omitted to erase, as they had intended to do, the name of Humphrey, in respect of which no claim had been received by them. Under these circumstances, I think it was the duty of the revising barrister to disallow the vote. We have been referred to several authorities. *Davies* v. *Hopkins* (1) is clearly distinguishable. What was decided there was that the sufficiency of a notice of claim (under 6 Vict. c. 18, s. 4), is for the overseers, and therefore, where they have acted upon it by inserting the claimant's name in the list pursuant to s. 5, it is not competent to the revising barrister to inquire whether or not the claim is in form a compliance with the statute. That is clearly no authority for saying that he may waive the performance of a condition precedent, and supply that which is an essential part of the qualification. The Irish case of *Cullen* v. *Patterson* (2) is directly in point. There, the voter claimed to be and was inserted in the list applicable to inhabitant householders. At the revision it appeared that his true qualification was that of a lodger; and it was held that the revising barrister had no power under s. 4 of the Parliamentary Registration (Ireland) Act, 1885, 48 & 49 Vict. c. 17, to expunge his name from the list on which it appeared, and insert it with the true qualification in the appropriate list. The decisions of the Irish Courts are not absolutely binding upon us, but they are entitled to be treated with respect. In this instance, however, I must say that I entirely coincide in the view taken by Chief Justice May and the other judges in *Cullen* v. *Patterson*. (2)

POLLOCK, B. I have come to the same conclusion. To hold otherwise would, I think, be creating a qualification which has no existence. In *Davies* v. *Hopkins* (1) the question of qualification was not interfered with: the only point in issue was the waiver of a matter of form.

A. L. SMITH, J., concurred.

Appeal allowed.

Solicitor for appellant: *J. M. M'Donnell.*

Solicitors for respondent: *Halse, Trustram, & Co.*

(1) 3 C. B. (N.S.) 376; 27 L. J. (C.P.) 6.
(2) 18 Law Rep. (Irish) 274.

J. S.

1886
Dec. 4.

HONEYBONE, Appellant; HAMBRIDGE, Respondent.

Parliament—Borough Vote—Disqualification—Medical Relief—Uncertificated Midwife—Medical Relief Disqualification Removal Act, 1885 (48 & 49 *Vict. c.* 46), *ss.* 2, 4.

The wife of the appellant, being near her confinement, applied to the relieving-officer of the union for an order for the attendance of a medical man. The guardians authorized the relieving-officer to give her an order for such attendance, but she was in fact attended during her confinement by an uncertificated midwife, who was sent to her and paid by the relieving-officer:—

Held, that the relief afforded to the wife was "medical assistance" within 48 & 49 Vict. c. 46, s. 2, and that the appellant was not disqualified from being registered as a parliamentary voter.

Case stated by the revising barrister for the Northern Division of Oxford.

At a court held to revise the list of voters for the Northern Division of Oxford, Thomas Honeybone (the appellant) claimed to be inserted in the list of occupation voters as an inhabitant householder.

It was proved that he had duly given notice of his claim to the overseers of the parish, and that he was in all respects entitled to be registered as a voter, unless disqualified by the matters hereinafter stated.

In November, 1885, Naomi Honeybone, the wife of the appellant, made an application to the relieving-officer of the union that she might be attended during her then approaching confinement by a medical man. The application was laid before the board of guardians on the 25th, and the guardians passed a resolution permitting the relieving-officer to give her an order for the medical man to attend her during her confinement. Naomi Honeybone made no further application to the relieving-officer; and at her confinement, which took place in January, 1886, she was attended, not by a medical man, but by a midwife named Large.

It was admitted that Mrs. Large held no certificate as a midwife, and that she attended the appellant's wife at the instance of the relieving-officer, and not at the request or apparently with the knowledge of the medical officer.

In January, 1886, the relieving-officer, on the application of the midwife, paid her 4*s.* in respect of her attendance on the appellant's wife. Neither the appellant nor his wife asked the relieving-officer to pay the 4*s.* or any other sum to the midwife.

It was stated to be the usual practice in the district for the guardians to pay 10*s.* 6*d.* to the medical man for attendance at a confinement under an order, and that, if a midwife attended in the place of a medical man, the relieving-officer was authorized to pay such midwife the sum of 4*s.* in respect of her attendance.

It was objected that the appellant was not entitled to be registered as a voter, by reason of his having during the qualifying year received parochial relief. For the appellant it was contended that the relief proved to have been given to his wife was "medical or surgical attendance" within the meaning of the Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46), s. 2, and that by virtue of that Act its receipt did not disqualify him from being registered.

The revising barrister decided in favour of the objection, and disallowed the claim of the appellant.

If the Court should be of opinion that the decision was wrong, the register was to be amended by inserting the name of the appellant on the list of occupation voters.

Asquith, for the appellant. The assistance rendered to the appellant's wife under the circumstances stated in the case was "medical or surgical assistance" within the fair meaning if not strictly within the words of the Medical Relief Disqualification Removal Act, 1885. The 2nd section enacts that, "where a person has received, for himself or for any member of his family, any medical or surgical assistance or any medicine at the expense of any poor-rate, such person shall not by reason thereof be deprived of any right to be registered or to vote as a parliamentary voter:" and s. 4 provides that "the term medical or surgical assistance in this Act shall include all medical and surgical attendance and all matters and things supplied by or on the recommendation of the medical officer having authority to give such attendance and recommendation at the expense

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of any poor-rate." The application made to the relieving-officer was for the attendance of the medical man at his wife's confinement, and the service performed was the same as that which would have been performed by the medical man if he had been present. It is true that the midwife did not attend the wife at the request or apparently with the knowledge of the medical man, but at the instance of the relieving-officer, who, however, was authorized by a resolution of the guardians of the parish or union to give the wife an order for the attendance of the medical man. The mere fact of the midwife not being certified can make no difference.

No counsel appeared on behalf of the respondent.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister in this case was wrong, and that the name of the appellant must be inserted in the list of occupation voters: and in coming to that conclusion I think we are only carrying out the evident intention of the legislature. It never could have contemplated that the husband should be disqualified by an attendance like this upon his wife. The guardians, it seems, passed a resolution permitting the relieving-officer to give the wife an order for the attendance of the medical man at her confinement; and if he had attended he would have received a fee of 10*s.* 6*d.*; and in that case the husband beyond all question would not have lost his vote. Instead, however, of sending the medical man, the relieving-officer sends a midwife, and pays her 4*s.* So stated the case seems to me to be free from difficulty. It seems to me to be perfectly plain that the assistance afforded at the wife's confinement was exactly of the kind that the Act intended should not disqualify the husband as a voter. The appeal must be allowed.

POLLOCK, B. I must confess I have felt considerable doubt during the argument of this case, but upon the whole I agree with my Lord that the relief afforded to the appellant's wife clearly was "medical or surgical assistance" within the spirit of the Act of 1885. The rights of the husband are not to

depend upon the character of the attendant, but upon the nature of the service rendered. As the guardians gave the order for the attendance of the medical officer, the fact of the woman being satisfied with the assistance of a less qualified person cannot make the attendance less "medical or surgical attendance" within the meaning of the Act.

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A. L. SMITH, J., concurred.

Appeal allowed.

Solicitors for appellant: *Mackeson, Taylor, & Arnould, for Kilby & Mace, Chipping Norton.*

J. S.

DOULON, APPELLANT; HALSE, RESPONDENT.

Dec. 4.

Parliament—Borough Vote—"Incapacity to vote"—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102)—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 7—*Metropolitan Police Act* (10 *Geo.* 4, *c.* 44), *s.* 18.

By 10 Geo. 4, c. 44, s. 18, a constable of the Metropolitan police-force is disqualified from voting at the election of a member of parliament for certain counties or for any city or borough within the Metropolitan police-district:—

Held, that such a constable is a person "incapacitated by law or statute from voting," within 41 & 42 Vict. c. 26, s. 28, sub-s. 7, and consequently is not entitled to be retained on the list of voters under the Registration of the People Act, 1867 (30 & 31 Vict. c. 102).

CASE stated by the revising barrister for Middlesex.

The appellant's name appeared in the occupiers list for the South Division of the borough of St. Pancras, as the occupier of "20 Brighton Street."

It appeared that he was on the last day of July, 1886, a constable in the Metropolitan police-force appointed by virtue of the 10 Geo. 4, c. 44; and that the borough of St. Pancras is within the Metropolitan police-district.

No objection had been made to the appellant's name being retained in the list on the ground of his being such constable, though an objection had been made on other grounds which was not sustained.

It was contended on behalf of the appellant, that, notwith-

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standing the provisions of 10 Geo. 4, c. 44, s. 18 (1), he was entitled to have his name retained on the list, for the following reasons,—1. That the incapacity to vote did not extend to registration; in support of which contention 2 Will. 4, c. 45, ss. 36 and 38, and 49 Vict. c. 3, s. 4, were referred to as shewing that where the legislature intended to disqualify from registration it did so in express terms,—2. That, by imposing a penalty of 100*l.* on police-constables voting at parliamentary elections, the legislature had shewn an intention that such persons should be placed on the register; since, unless registered, they could not vote, and therefore could not incur the penalty,—3. That, although the earlier part of 10 Geo. 4, c. 44, s. 18, did in terms render Metropolitan police-constables incapable of voting within the Metropolitan police-district, the true construction of the whole section was that they were entitled to vote, subject to a liability to the prescribed penalty,—4. That, to exclude a police-constable from the register would indirectly create an incapacity, or at all events would extend such incapacity, beyond the time fixed for its termination, viz. six months after retirement from the force,—5. That, even if the appellant was as a Metropolitan police-constable incapable both of voting and of being registered as a voter for the borough, his incapacity was of a temporary and casual nature, and not such as to justify the revising barrister in expunging his name without objection duly made on the ground of such incapacity.

The revising barrister decided against the appellant's contention, and expunged his name from the occupiers list.

The questions for the decision of the Court were,—1. Whether the appellant, as a constable in the Metropolitan police-force, was incapacitated from being registered as a voter in the borough,—2. Whether, if he was so incapacitated, the revising barrister was

(1) Which, amongst other things, enacts that "no person belonging to the police-force appointed by virtue of this Act shall during the time that he shall continue in any such office, or within six calendar months after he shall have quitted the same, be capable of giving his vote for the election of a member to serve in parliament for the counties of Middlesex, Surrey, Hertford, Essex, or Kent, or for any city or borough within the Metropolitan police district," &c., under a penalty of 100*l.*

right in expunging his name, though not objected to on the ground of such incapacity.

Beddall, for the appellant. The Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 7, requires the revising barrister to expunge from the list of voters the name of every person, whether objected to or not, where it is proved to him that such person was, on the last day of July then next preceding, "incapacitated by any law or statute" from voting at an election for the parliamentary borough or an election for the municipal borough, as the case may be, to which the list relates. The incapacity there mentioned evidently points to some general disqualification or incapacity to vote at all, such as that of a peer, a woman, or a person holding an office or employment under the Crown, or a person convicted of crime, as put by Lindley, J., in *Hayward* v. *Scott* (1); and not to a temporary incapacity, such as the receipt of parochial relief during the qualifying year: and see *Stowe* v. *Jolliffe*. (2)

The second point is untenable since the case of *Cooper* v. *Harris*, *Austin's Case*. (3)

R. Bray, contrà, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister was correct, and must be affirmed. Looking at the words of sub-s. 7 of 41 & 42 Vict. c. 26, s. 28, which we have to construe, I am clearly of opinion that the only construction they admit of is that which the revising barrister has put upon them. By 10 Geo. 4, c. 44, s. 18, a constable of the Metropolitan police-force is declared to be incapable of voting at an election of a member of parliament within the Metropolitan police-district whilst he continues to be a member of the force, or within six calendar months after he shall have ceased to be a member of the force. It cannot be doubted that the appellant in this case comes within the very words of that provision. He is, therefore, a person who is incapacitated by a statute from voting within the Metropolitan area. Sub-s. 7 of 41 & 42 Vict.

(1) 5 C. P. D. 231, 234. (2) Law Rep. 9 C. P. 734.
(3) 7 M. & G. 97.

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c. 26, s. 28, requires the revising barrister to expunge from the list of voters the name of every person, whether objected to or not, where it is proved to him that such person is incapacitated by any law or statute from voting. This appellant, it is true, was not objected to upon that ground, and therefore had no notice that the point would be raised: but sub-s. 8 provides that, "before expunging from a list the name of any person not objected to, the revising barrister shall cause such notice, if any, as shall appear to him necessary or proper under the circumstances of the proposal to expunge the name, to be given to or left at the usual or last-known place of abode of such person;" and we cannot assume that the revising barrister failed to do his duty. The appellant, therefore, sustains no hardship or injustice from the absence of a formal notice of objection. The words of the enactment are plain; and they have received a distinct interpretation, though upon another statute, in *Stowe* v. *Jolliffe*. (1) The appeal must be disallowed.

POLLOCK, B. It was the duty of the revising barrister to construe sub-s. 7 of s. 28 of 41 & 42 Vict. c. 26. The words are, The revising barrister shall expunge the name of every person, whether objected to or not, where it is proved to him that such person was, on the last day of July then next preceding, "incapacitated by any law or statute from voting" at an election for the parliamentary borough or an election for the municipal borough, as the case may be, to which the list relates. The question was whether the appellant in this case was a person who was incapacitated from voting by any law or statute. Now, the 10 Geo. 4, c. 44, s. 18, enacted that no person belonging to the Metropolitan police-force by virtue of that Act should during the time that he should continue in that service, or within six calendar months after he should have quitted it, be capable of giving his vote for the election of a member for any borough within the Metropolitan police-district. We are asked to say that this appellant was entitled to be registered upon the authority of *Hayward* v. *Scott* (2), where it was held that the "incapacity" referred to in that sub-section meant such

(1) Law. Rep. 9 C. P. 734. (2) 5 C. P. D. 231, 234.

incapacities as those mentioned in *Stowe* v. *Jolliffe* (1), viz. a general incapacity to vote at all, as of persons who, from some inherent quality in themselves, have not, either by prohibition of statutes or of the common law, the status of parliamentary electors, such as peers, women, persons holding office under the Crown, persons convicted of crimes which disqualify, or the like; and not to a mere temporary incapacity or disqualification, such as the receipt of parochial relief, and the like. But the decision in *Stowe* v. *Jolliffe* (1) turned upon the words of the proviso in s. 7 of the Ballot Act, 35 & 36 Vict. c. 33, that "nothing in this section shall entitle any person to vote who is "prohibited from voting by any statute or by the common law of parliament,"—words very different from those which we have to construe upon the present occasion. Where the legislature uses different words in a series of Acts of Parliament having reference to the same subject, we must assume that they mean a different thing.

A. L. SMITH, J. I am of the same opinion. I think the point is unarguable. The revising barrister is, by sub-s. 7 of 41 & 42 Vict. c. 26, s. 28, to expunge the name of every person, whether objected to or not, where it is proved to him that such person was, on the last day of July then next preceding, incapacitated by any law or statute from voting. The appellant was a person who was on that day incapacitated by statute from voting. The case is distinguishable from *Stowe* v. *Jolliffe* (1) and *Hayward* v. *Scott* (2), upon the ground stated by my Brother Pollock.

Appeal dismissed.

Solicitor for appellant: *G. B. Crook.*
Solicitors for respondent: *Halse, Trustram & Co.*

(1) Law Rep. 9 C. P. 734. (2) 5 C. P. D. 231.

J. S.

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Dec. 4.

SPITTALL, Appellant; BROOK, Town Clerk of Warrington, Respondent.

Parliament—Borough Vote—Occupation Franchise—Non-commissioned Officers' Rooms in Barracks—Compulsory Absence on Duty during the qualifying Year—Representation of the People Act, 1884 (48 *Vict. c.* 3), *s.* 3.

The appellant, a non-commissioned officer, resided with his family in barracks, situate within a borough, in separate rooms allotted to him by the quartermaster general. During twenty-seven days of the qualifying year he was compulsorily absent from the borough, but while so absent his name was retained on the strength of the regimental depôt in the monthly returns to the War Office, and the rooms continued to be occupied by his furniture and his family; but he himself could not (unless by leave, which he had obtained for one or two days) return to the borough without being guilty of a breach of duty:—

Held, following *Ford* v. *Barnes* (16 Q. B. D. 254), that the appellant had not occupied the rooms in the barracks during the qualifying period, and that he was not entitled to be registered as a voter for the borough.

Case stated by the revising barrister for the South-eastern Division of the county of Lancaster.

At the revision of the lists of voters for the borough of Warrington, the appellant and nineteen others, whose names were inserted in a schedule annexed to the case, appeared in the occupiers' list for the township of Warrington. They were duly objected to as not being inhabitant occupiers within s. 3 of the Representation of the People Act, 1884. The facts in support of the objection were as follows:—

The appellant Spittall is a married non-commissioned officer residing with his family in the Orford Barracks, Warrington, in separate rooms allotted to him by the military authorities, such rooms constituting a dwelling-house, partly furnished by himself.

The rooms occupied by him had been assigned by the quartermaster, and might be changed at his (the quartermaster's) discretion, but had been retained by the appellant during the qualifying year.

The appellant had been compulsorily absent on duty at Altcar, in Lancashire, for twenty-seven days during the qualifying year: but, while so absent on duty, his name was retained on the strength of the Warrington regimental depôt in the monthly

return of the forces made by the commanding officer to the War Office; and the rooms continued to be occupied by his furniture and family.

It was not denied that the quartermaster could resume possession of the rooms at any time by allotting the appellant other premises: but in fact no such resumption had taken place.

Neither the appellant nor any of the persons referred to in the schedule, with one exception,—James Logan (a warrant officer), in whose case a verbal permission was deemed sufficient,—could whilst compulsorily absent on duty at Altcar or elsewhere return to personal inhabitancy of his rooms without a written permission or pass signed by the colonel or commanding officer prescribing the number of hours and the purpose for which it was granted as well as the hours between which the pass could be used.

Reasonable leave was usually granted to persons in the position of the appellant, as of course; and the majority of the persons named in the schedule, including the appellant, had availed themselves of the privilege accorded, and had returned to Warrington for one or more days during the period of compulsory absence aforesaid.

The objection taken to the name of the appellant being on the occupiers' list was, that he had not occupied the qualifying premises for the qualifying period.

The revising barrister found that the appellant had not occupied during the qualifying period, and struck out his name.

If the Court should be of opinion that the constructive inhabitancy of the appellant had on the facts been made out, and that the revising barrister was wrong in erasing his name, it was to be reinstated, together with the names of the other nineteen persons.

R. Pierpoint, for the appellant. Though the appellant was temporarily absent from his dwelling-house during a small portion of the qualifying year, his family and furniture continued to occupy the rooms which had been allotted to him in the barracks. The case therefore is not governed by *Ford* v. *Barnes*. (1)

Henn Collins, Q.C., contrà, was not called upon.

(1) 16 Q. B. D. 254.

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LORD COLERIDGE, C.J. This point was decided in *Ford* v. *Barnes* (1), and we cannot hear it again. In delivering the judgment of the Court in that case, Cave, J., says (2) that actual inhabitancy during every one of the three hundred and sixty-five days making up the qualifying period is not necessary, and it is sufficient if the claimant can make out a constructive inhabitancy; but that, "in order to make out a constructive inhabitancy, there must be an intention of returning after a temporary absence, and a power of returning at any time without breach of any legal obligation." Here, the inhabitancy during the qualifying year having been compulsorily broken pursuant to the rules of the service, the appellant was clearly disentitled to be placed upon the register under s. 3 of the Act of 1884. The appeal must be dismissed, and with costs.

POLLOCK, B., and A. L. SMITH, J., concurred.

Appeal dismissed.

Solicitors for appellant: *Gregory, Rowcliffes, & Co.*
Solicitor for respondent: *W. H. Brook, Warrington.*

J. S.

1887
Jan. 20.

FOSTER *v.* DIPHWYS CASSON SLATE COMPANY AND ANOTHER.

Mines—Gunpowder, Conveyance of—"Case or Canister"—Metalliferous Mines Act, 1872 (35 & 36 *Vict. c.* 77), *s.* 23, *sub-s.* 2 (*b*).

By the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), s. 23, sub-s. 2, "Gunpowder or other explosive or inflammable substance shall not be taken into the mine except in a case or canister containing not more than four pounds":—

Held, that the word "case" as used in the section must be taken to mean something solid and substantial in the nature of a canister, and that a bag of linen or calico was not such a "case."

CASE stated by justices of Merionethshire under 20 & 21 Vict. c. 43.

At the hearing of an information by the appellant, an inspector of mines, against the respondent company, who were the owners,

(1) 16 Q. B. D. 254. (2) At p. 268.

and the respondent Jones, who was the manager of a mine, for that they did cause to be taken into the mine certain gunpowder, to wit, seven parcels not contained in cases or canisters, in contravention of s. 23, sub-s. 2 (*b*), of the Metalliferous Mines Regulation Act, 1872, the following facts were proved or admitted:—

On March 29, 1886, Hugh John Jones, a youth of sixteen years of age, employed at the mine, carried into an underground adit or level which led into the workings of the mine, 8 lbs. of gunpowder contained in two calico or linen bags each containing 4 lbs. of gunpowder: another workman, Hugh Samuel Jones, followed immediately behind Hugh John Jones also carrying two like bags each containing 4 lbs. of gunpowder, and Robert Lewis, another workman, followed immediately behind Hugh Samuel Jones carrying three like bags each containing 4 lbs. of gunpowder. Hugh John Jones, whilst proceeding along the underground adit or level (being in length from the mouth to the end, where the powder was required to be used, about 170 yards) struck a match, for what purpose did not clearly appear, as the level was proved to have been properly and sufficiently lighted by fixed lamps—a witness stated that Hugh John Jones struck the match for the purpose of lighting a candle—the powder Hugh John Jones carried immediately ignited and exploded, and in consequence the powder contained in the bags carried by the other two men following him also ignited and exploded. Hugh John Jones received fatal injuries from which he died, and the other two men were much injured, and also another workman who was in the level at the time of the explosion.

The gunpowder was in the habit of being conveyed into the mines of the defendant company, which were partly carried on by open workings, in metal canisters called "horns," and also in the aforesaid bags, the gunpowder being made up by the gunpowder manufacturers before sale in these 4 lb. linen or calico bags, placed, for the purpose of being conveyed by railway or otherwise from the manufactory, in wooden boxes or barrels, and so delivered to the defendant company's magazine, situate at a distance of about a quarter of a mile from the mouth of the level referred to.

The bags of gunpowder were delivered by the magazine keeper

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to the workmen Hugh Samuel Jones and Robert Lewis out of the stores kept in the magazine.

There was a difference of opinion among persons skilled in mining as to whether, under certain conditions, and having regard to the danger of leakage, gunpowder was not more safely carried into the mine in these bags than in wood, metal, or similar cases or canisters.

By s. 23, sub-s. 2, of the Metalliferous Mines Regulation Act, 1872, "Gunpowder or other explosive or inflammable substance shall only be used underground in the mine as follows: (*a.*) It shall not be stored in the mine; (*b.*) It shall not be taken into the mine except in a case or canister containing not more than four pounds." The justices being of opinion that the term "case" as used in the Act could not be considered as excluding a linen or calico bag, dismissed the information. The question was whether a linen or calico bag could be considered to be a "case or canister" as used in par. (*b*) of the said sub-section of the Act.

Sir R. E. Webster, A.G. (*R. S. Wright*, with him), for the appellant. The intention of the legislature was to guard against the possibility of explosive substances used in mines being ignited. Having regard to that intention, the words "case or canister" must be deemed alternative words, and the word "case" be construed to mean something in the nature of a canister. The bag in question is not such a "case."

THE COURT called on

Bankes, for the respondents. The ordinary meaning of the word "case" will include a "bag." For example, "rod case," "bow case." Primâ facie the words of an Act of Parliament are to be read in their ordinary meaning, and, as Jessel, M.R., said in *Nuth* v. *Tamplin* (1), "any one who contends that a section of an Act of Parliament is not to be read literally, must be able to shew one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act." See also per Thesiger, L.J., in *Sullivan* v. *Mitcalfe*. (2) There is nothing in this Act to restrict the ordinary meaning of the word "case."

(1) 8 Q. B. D. 247, at p. 253. (2) 5 C. P. D. 455, at p. 549.

Before the Act there was no similar provision for carrying gunpowder into mines, and the subsequent Act, the Explosives Act, 1875, 38 Vict. c. 17, s. 22, enacts that the gunpowder shall be in a substantial "case, bag, canister, or other receptacle." If in the earlier Act the words "case" and "canister" are synonymous, then in the later Act "case" and "bag" are synonymous.

Other regulations of the mines prevent the risk of fire coming into contact with powder. This provision as to a case is to prevent grains of powder dropping about. Under certain circumstances, a bag is safer than a canister, as the case shews. If the ordinary meaning of "case" includes a bag, as dictionaries shew, what restriction can be placed on it as used in this Act? Surely a leathern bag would be an effectual "case."

LORD COLERIDGE, C.J. I am of opinion that the justices have decided wrongly, and that a bag of the kind before us is not a case within the meaning of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77). Part II. of the Act contains rules for the protection of the lives of workmen in mines, and s. 23, sub-s. 2, enacts that "gunpowder or other explosive or inflammable substance," such for example as gun cotton or dynamite used for blasting, "shall only be used underground in the mine as follows: (*a.*) It shall not be stored in the mine; (*b.*) It shall not be taken into the mine except in a case or canister containing not more than 4 lbs. (*c.*) A workman shall not have in use at one time in any one place more than one of such cases or canisters: (*d.*) In charging holes for blasting . . . . an iron or steel pricker shall not be used," &c. "(*e.*) A charge of powder which has missed fire shall not be unrammed." Those are the five clauses applying to the use of gunpowder, and all of them point to safety in using it in the working of the mines. I should say that here the words "case or canister" explain one another, that the word "case" which is used in this place and in connection with "canister," must mean a case in the nature of a "canister," not strictly speaking a canister, but a solid and substantial thing of wood, or metal, or some other such solid substance, which can be covered over so as to prevent ignition from a spark. That seems a proper view of this section, because

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Lord Coleridge, C.J.

in so construing the Act we give effect to the Act according to its purposes.

It was decided in *Biggs* v. *Mitchell* (1) that where an Act provided that no person should "have or keep" more than a certain quantity of gunpowder, the word "have" was explained by the word "keep," and therefore a carrier who had in a warehouse 300 lbs. of gunpowder was not liable under the Act, because the gunpowder was there merely for transit. This construction had the effect of defeating the whole object of the Act, because London was night after night exposed to great peril from engines emitting sparks passing close to the repository of a large quantity of gunpowder. It may be that this decision led to the subsequent Act to which the counsel for the respondent referred us. That is an instance of the way in which Acts of Parliament have been interpreted. In the present case it is impossible to doubt that having gunpowder in a bag of this kind in a coal mine is very hazardous, and in fact an accident happened. I do not think the respondents gained much by referring to the subsequent Act, for it is directed to a totally different subject, viz., the conveyance of gunpowder in the open air, and not below ground where there is no escape, and, by s. 33, in every case with respect to the conveyance of gunpowder over 5 lbs. weight, elaborate care is taken that the gunpowder shall be covered by a solid case, and even where the conveyance is limited to 5 lbs. only, a "substantial case," "made and closed so as to prevent the gunpowder from escaping," shall be used. It was admitted that a net if sufficiently fine would be a "case," within the meaning of the Act: and we are familiar with the fact that some most powerful gunpowder is made in such large grains that it could be carried in a net which need not be particularly fine to hold it. But a net would be no protection whatever in a mine. I am clearly of opinion that this bag is not a "case," within the meaning of the Act, and the justices must proceed to convict.

GROVE, J. I am entirely of the same opinion. Not a bad mode of treating an Act of Parliament is to see how it would be read supposing no legal case depended on the construction of it. That

(1) 31 L. J. (M.C.) 163.

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is one test, although not conclusive. When I first read s. 23 it never occurred to me that "case" meant "bag," nor indeed should I have expected, until a definition was found including bag—which may be sometimes the same as a case—that "case" could include "bag." For "case" primâ facie to my mind means something solid—not confined perhaps to box, canister, or tin case, but something of a solid character. The counsel for the respondents in answer to a question put to him as to "net," defined "case" to mean anything which would include another thing. So perhaps a handkerchief or net might be a "case." A fine net would carry coarse blasting-powder perhaps without danger of its escaping, yet with imminent danger of explosion from a spark even out of a domestic fire, and certainly from one of those hard sparks which are blown out of engines, and which would penetrate a much thicker and more substantial thing than even this calico bag, and explode gunpowder in it. Can anyone, except a person seeking a way out of the Act, interpret the word "case," used in s. 23 (2) (*b.*), otherwise than as meaning something solid? But it is said the word "case," according to the dictionary, may include a bag. There are few words that cannot be used in more senses than one, and are not capable of some exceptional interpretation different from the ordinary meaning if taken from their context. I have as an author tried in vain to find words not capable of being applied differently to my intention. Language does not admit of mathematical accuracy, and it is impossible to use words which, with all their various senses, may not be used in a different sense to that in which the author used them. Nobody reading this Act by ordinary common sense would say that in an Act providing against accidents from explosion of gunpowder, the provision that "It shall not be taken into the mine except in a case or canister," means that it may be taken in a thin calico bag or even in a net, because a net would include some kinds of gunpowder. Every one would understand the word "case" there to mean something solid, something permanent, which would save the gunpowder from being exploded. Then comes the question asked by my Lord, are we to construe the Act as it would be construed by an intelligent disinterested person, or are we to destroy the object of it by finding out that

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some word could be used (as most words can be) in senses totally different to that intended by the Act. Bag is not, however, the ordinary meaning of the word "case," and I have not the least doubt that it is not the meaning intended by this Act. I am of opinion that "case" in s. 23 (2) (*b.*) means—as "canister" means—something solid, and capable of reasonably protecting gunpowder taken into a mine, one of the very sources of danger against which the Act is directed. Gunpowder is not to be conveyed into a mine except in something that will protect it. A "case" or "canister" would protect it from a spark or hot cinder which would be almost certain to explode it if only in a thin bag, and still more so if in a net. I think a bag of the kind before us is not a "case or canister" within the meaning of the Act, and my opinion is confirmed by the Act of 1875 (38 Vict. c. 17), for there the word "bag" is used, and if the amount of gunpowder is more than 5 lbs., the bag must be included in another case, which obviously means a substantial case that will protect the gunpowder from accident. That Act rather impairs the argument for the respondents, by treating the word "bag," not as synonymous with, but as something different from "case."

Case remitted to justices.

Solicitor for appellant: *Solicitor to the Treasury.*

Solicitors for respondents: *Kennedy, Hughes, & Kennedy, for Acton, Bury, & Acton, Wrexham.*

J. R.

[IN THE COURT OF APPEAL.]

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Jan. 26.

OPPERT *v.* BEAUMONT AND ANOTHER.

Practice—Stay of Execution—Appeal—Jurisdiction of Master to stay Execution pending Appeal—Order LVIII., r. 16.

A master has jurisdiction under Order LVIII., r. 16, to stay execution on a judgment pending an appeal to the Court of Appeal.

Decision of the Queen's Bench Division affirmed.

APPEAL from a decision of the Queen's Bench Division.

In an action tried before Fry, L.J., sitting as a judge of the Queen's Bench Division, the defendants obtained judgment dismissing the action.

The plaintiff gave notice of appeal from that judgment to the Court of Appeal, and applied to a master in chambers for a stay of execution pending the appeal.

The master having made an order for a stay of execution, a judge in chambers affirmed that order, and a Divisional Court (Denman and Hawkins, JJ.) affirmed the judge's decision.

The defendants appealed.

R. V. Williams, for the appellants. By Order LVIII., r. 16, "an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order." It is submitted that an application for a stay of execution under that rule must be made to the Court or judge by whom the decision appealed from was given, or to the Court of Appeal, if the Court or judge refuse to grant a stay. It is conceded that in ordinary cases a master may, under Order LIV., r. 12, exercise all the jurisdiction of a judge at chambers, but by rule 16 of Order LVIII., it was intended to exclude the master from exercising jurisdiction in respect of staying execution on the ground that an appeal is pending to the Court of Appeal. Rule 17 of the same Order implies that construction, because it provides that, "wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or

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to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below."

Cock, Q.C., and *J. Scarlett*, for the respondent, were not heard.

BOWEN, L.J. The only question we have to decide is whether the application for a stay of execution pending the appeal from the judgment at the trial could properly be made to the master at chambers. This question depends entirely upon the true construction of Order LVIII., r. 16. It has been argued that the master has no jurisdiction because he is not one of the persons mentioned in the rule, who are "the Court appealed from, or any judge thereof, or the Court of Appeal." It must be remembered that under Order LIV., r. 12, a master has all the jurisdiction of a judge at chambers, except in certain specified instances of which this is not one. The language of rule 16 is not very accurate, because it begins by saying, "an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except," &c.; but the appeal itself cannot operate as a stay; it is the order of the Court or judge which has that effect. I am of opinion that the true intention of the rule was to leave untouched the ordinary jurisdiction of the Court, and that it was intended that a master should have jurisdiction to stay proceedings pending an appeal to the Court of Appeal. The words, "the Court appealed from, or any judge thereof, or the Court of Appeal," were introduced, because it was contemplated that there might be cases in which the application would more properly be made in the first instance to the Court whose decision was appealed from, or to the Court of Appeal. I can see no good reason why the master should not, as one of the officers of the Court in which the judgment had been obtained, have the same jurisdiction as a judge at chambers to deal with the question of a stay of execution. The construction of rule 16 which has been suggested would, I think, lead to great confusion. The judges of the Queen's Bench Division sit according to a rota involving frequent changes in the constitution of the Courts, and, owing to this and to the frequent recurrence of the circuits, it might be impossible or difficult to make the application to the Court which tried the case. The course which it was contended ought to be

taken with respect to appeals to the Court of Appeal is quite different from that adopted by the Queen's Bench Division with respect to their own appellate business. I cannot think that a different rule should be adopted in respect of each class of appeals. I am of opinion that this appeal should be dismissed.

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FRY, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Le Brasseur & Oakley.*
Solicitors for respondent: *Harper & Battcock.*

W. A.

BLAKE, APPELLANT; THE MAYOR AND CITIZENS OF THE CITY OF LONDON, RESPONDENTS.

1886 *Dec.* 10, 13.

Revenue—Landlord's Property Tax—Allowances—Public Schools—Charitable Institutions—5 & 6 Vict. c. 35, s. 61, Rule VI.

By s. 61, Rule VI., of 5 & 6 Vict. c. 35, allowances in respect of property tax, levied under Schedule A. of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, or premises" belonging thereto, if occupied under certain specified conditions:—

Held, that the application of Rule VI. was not limited to public schools maintained wholly by charity, but that the rule applied to a public school maintained partly by charitable endowments and partly by fees charged for instruction.

CASE stated, under 43 & 44 Vict. c. 19, s. 59, by the commissioners for the general purposes of the Income Tax Acts for the city of London.

The following material facts appeared from the statements in the case, and from the prospectus of the City of London School, which was made part of it.

The City of London School was founded in manner following:—

"By 4 & 5 Wm. 4, c. 35 (private Act), after reciting that the mayor, aldermen, and commons of the city of London in common council assembled are desirous of establishing a school in the city of London for the instruction of boys in the higher branches of literature, and reciting that the yearly sum of 19*l.* 10*s.* hath

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for many years been paid by the mayor and commonalty and citizens of the city of London out of the rents and profits of lands and tenements belonging to them, which are usually called the estates of John Carpenter, formerly town clerk of the said city, towards the education and clothing of four boys, sons of freemen of the said city of London, and such payment is believed to be made in pursuance of the will of the said John Carpenter, but such will cannot be found:" And reciting that "the said mayor, aldermen, and commons . . . . are willing, instead of paying the said annual sum towards the education and clothing of four boys aforesaid, to charge the said lands, tenements, and hereditaments called the Carpenter estates, together with other hereditaments belonging to them, with the payment of the perpetual annual sum of 900*l.* towards the support of such school as aforesaid:" And after provision made for ground in Honey Lane Market being appropriated for a site for the said school, it is by s. 4 enacted "that the said mayor and commonalty and citizens, and their successors, shall for ever thereafter maintain upon the said ground so to be appropriated as aforesaid, and at the houses and buildings to be erected thereon, a school for the religious and virtuous education of boys, and for instructing them in the higher branches of literature and all other useful learning."

By s. 5 the common council are empowered to make regulations for the management of the said school as they "shall deem to conduce most to the extension of religious and useful education in the city of London."

By the City of London School Act, 1879 (42 & 43 Vict. c. lxiii.), s. 4, the corporation were empowered to appropriate certain lands facing Victoria Embankment, and build thereon and prepare the same for the said school; and by s. 5 they were required to remove and transfer the school to such new premises, and on the new premises ever thereafter to maintain, conduct, and carry on the school in like manner in every respect as immediately before such removal and transfer they were authorized to maintain, conduct, and carry on the school on the old premises, subject to the provisions of the Act of 1834.

In accordance with the provisions of the last-recited Act, the

corporation appropriated the land facing Victoria Embankment, and built extensive schools thereon, in which are now educated a large number of boys.

No profit has been made or sought by the corporation out of the schools, but on the contrary a yearly deficiency of income to meet expenditure is made up and covered by the corporation out of their own moneys, which deficiency for the year ending December 31, 1883, amounted to the sum of 2861*l.* 8*s.* 3*d.*

The object of the school (as stated in the prospectus) is "to furnish a liberal and useful education for the sons of respectable persons who are engaged in professional, commercial, or trading pursuits, without the necessity of removing them from the care and control of their parents." Boys are admissible at any age between seven and fifteen years. The mode of admission is according to a form which is required to be signed by the parent or guardian, and also by some members of the corporation, either aldermen or common councilmen. Members are not limited as to the number of recommendations they may sign. The charge for each pupil is 12*l.* 12*s.* per year up to the age of twelve, and 15*l.* 15*s.* per year after that age. The sons of freemen and of householders in the city of London have a preference for admission to the school.

By s. 2 of 16 & 17 Vict. c. 34 (under which property tax is now levied), the duties therein granted shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described in Schedules A, B, C, D, and E, contained in that Act.

SCHEDULE A.

"For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof.

By s. 5, the duties are to be assessed, raised, levied, and collected under the regulations and provisions of 5 & 6 Vict. c. 35, and of the several Acts therein mentioned or referred to, and also of any Act or Acts passed explaining, altering, amending, or continuing the said first mentioned Act."

By 5 & 6 Vict. c. 35, s. 60, it is enacted that the duties granted

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under Schedule A shall be assessed and charged under the rules continued in that Act, which rules shall be deemed and construed to be a part of the Act.

Rule No. VI. contained in s. 61 of the same Act, specifies the "allowances to be made in respect of the said duties in Schedule A," which allowances are (inter alia) as follows: "For the duties charged on any college or hall in any of the universities of Great Britain in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall, and the gardens, walks, and grounds for recreation repaired and maintained by the funds of such college or hall, and on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouses, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same and for the repairs of such hospital, public school, or almshouse and offices belonging thereto, and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars and almsmen, repaired and maintained by the funds of such hospital, school or almshouse, or on any building the property of any literary and scientific institution used solely for the purpose of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise; provided also that the said building be not occupied by an officer of such institution, nor by any person paying rent for the same."

"The said allowances to be granted by the commissioners for general purposes in their respective districts," or on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes.

The said last-mentioned allowances to be granted on proof before the commissioners for special purposes of the due application of

the said rents and profits to charitable purposes only, and in and so far as the same shall be applied to charitable purposes only."

The City of London School buildings, offices, and premises, are not occupied by any officer or the master thereof, or by any person paying rent within the meaning of Rule VI. of the said last-named Act.

By the Valuation of Property (Metropolis) Act (32 & 33 Vict. c. 67), s. 6, the overseers of every metropolitan parish are to make and sign a valuation list of their parish in accordance with the Act; and by s. 45, the valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall be conclusive evidence of the gross and rateable values of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted for the purpose (inter alia) of "any tax assessed in pursuance of the Income Tax Act and any Acts continuing or amending the same on any lands, tenements, and hereditaments in all cases where the tax is charged on the gross value, and not on profits."

The school buildings and grounds of the City of London School were assessed in the valuation list of the parish of St. Bride for the years 1882 and 1883 at a rateable value of 1667*l.*, and a gross value of 2000*l.* Upon an appeal by the corporation against this valuation, the City solicitor contended (inter alia) that the appellants were entitled to claim allowances in respect of property tax under Rule VI. of 5 & 6 Vict. c. 35, s. 61, on the ground that the City of London School was a public school within the meaning of that rule.

The surveyor of taxes contended that the school was a class school, and not a public school.

The commissioners decided that the school was a public school, and that the appellants were entitled to a certificate of allowance under Rule VI., and the commissioners, on the application of the surveyor of taxes, stated this case for the opinion of the Queen's Bench Division.

Sir E. Clarke, S.G. (*A. V. Dicey*, with him), for the surveyor of taxes. The exemption from the property tax contained in s. 61,

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rule vi., of 5 & 6 Vict. c. 35, is intended to be in respect of charitable institutions only. In order to fall within the exemption the "public school" must be one in which education is given gratis. It is clear that the legislature did not mean to include all schools in the benefit of the exemption. Some limitation must have been intended to the words "public school"; and it is impossible to draw the dividing line at which schools cease to be entitled to the exemption unless the construction be adopted that it applies only to schools in which no payment is made by parents for instruction given to their children. That construction is supported by the language used in the earlier Acts with respect to similar duties applied to the same subject-matter:—43 Geo. 3, c. 122, No. IV., Exemptions from Duties in Sched. A. (Property Tax); 46 Geo. 3, c. 65, No. VI. of the allowances under Sched. A. (Property Tax); 48 Geo. 3, c. 55, Case II., Exemptions from the Duties under Sched. A. (Inhabited House Duty). The appellants do not contend that the fact that the school is for the benefit of a particular class of persons prevents it from being a public school; but, taking the facts with respect to the constitution of the school and the regulations under which it is carried out, and applying the language of the Act to those facts, it is contended that this is not such a public school as the Act contemplated. The corporation are under no obligation to carry on the school, or to carry it on in any particular way. Though they in fact charge for instruction sums which do not cover the expenses, they might, if they pleased, make charges which would secure a profit. It is not like the case of a trust to carry on a school receiving therefor some small specified remuneration. The corporation cannot be privileged in respect of these duties over persons who carry on private schools, many of which make no profits. In the Public Schools Act, 1868 (31 & 32 Vict. c. 118), the public schools to which the Act applies are enumerated in s. 3, and the City of London School is not included. Whether or not this is a "public school" within 5 & 6 Vict. c. 35, is a question of law depending upon the construction of that statute, and therefore an appeal will lie from the decision of the commissioners under 43 & 44 Vict. c. 19, s. 59, which gives them power to state a case, if the appellants be dissatisfied with their determination as being "erroneous in point of law."

Pollard, for the mayor, &c. of the city of London. No appeal will lie in this case, the commissioners having found on all the facts before them that this was a public school. It is a question of fact. The words "public school" in 5 & 6 Vict. c. 35, s. 61, rule VI., ought not to receive the limited construction suggested for the appellant. There is nothing in the enactment to shew that the legislature intended to exempt such schools only as were purely charity schools. This school being the creature of statute the corporation has an obligation to continue carrying it on. It is as much a "public school" in the conventional meaning of those words as any of the endowed schools mentioned in the Public Schools Act, 1868. That Act does not profess to define what are public schools, but only enacts provisions for the better government of "certain" specified public schools, and therefore assumes that there may be others than those specified.

[He referred to 27 & 28 Vict. c. 92, and 32 & 33 Vict. c. 56.]

DENMAN, J. Though I do not say that this case is free from doubt, upon the whole I have come to the conclusion that the City of London School is a public school within the meaning of 5 & 6 Vict. c. 35, s. 61. Rule VI. gives allowances, amounting to exemptions, in respect of "any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, &c., or on the rents and profits of lands, tenements, hereditaments or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." It is admitted that, if this is a public school to which the exemption applies, all the land occupied for the purposes of the school would be entitled to the benefit of the exemption. It was urged for the surveyor of taxes that the words "public school" ought to receive a limited construction derived from reading the Act in question in connection with earlier Acts relating to the same subjects. It was said that no school was a "public school" within the meaning of the Act, unless it was wholly supported by charity, and did not depend for its support in any way upon any payments by the parents of the scholars. The City of London School was founded

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under 4 & 5 Wm. 4, c. 35. The corporation charged certain lands vested in them with the annual payment of 900*l.* for the support of the school, and the Act made provision for appropriating a site for the school, and authorized them to maintain upon the ground so appropriated, and at the houses and buildings to be erected thereon, a school for the religious and virtuous education of boys, and for instructing them in the higher branches of literature and all other useful learning. By a recent Act the corporation were empowered to remove the school to a site appropriated for that purpose on the Victoria Embankment. The corporation have no option but to pay the 900*l.* per annum towards the support of the school. Certain fees are paid by the parents of the scholars for the instruction received, and the members of the corporation nominate or recommend the scholars; but the case finds that so far from making any profit out of the school there is a large yearly deficiency of income to meet expenditure, which deficiency the corporation themselves have to make good. Now I am not prepared to say that it is a pure question of law whether this is a public school within the meaning of the Act. There is no definition of a public school to be found in any textbook or Act of Parliament. The question, therefore, seems to be a mixed question of law and fact, and indeed is very much in the nature of a question of fact. The commissioners have found as a fact that this is a public school, and the surveyor of taxes contends that the question is one of law depending entirely upon the meaning of the words "public school" in the Act. I am of opinion that the limited construction contended for by the Solicitor General cannot be accepted. The main object of the legislature in providing the exemptions in s. 61 must be considered. The intention seems to have been to exempt not merely institutions which were purely charitable, but institutions ejusdem generis with the colleges and halls which form the first class of property exempted. There can be no doubt that the colleges and halls of the universities are not institutions wholly supported by charity. I think it is clear that the legislature did not intend the exemption to be in favour only of schools wholly supported by charity. The enactment seems to have been drawn with a mixed intention, namely, to exempt charitable institutions, and to exempt certain

institutions partly depending on charity, perhaps in view of the beneficial character of the objects of those institutions. Some colour is given to the argument for the surveyor of taxes by the fact that public schools are put in the same collocation with hospitals and almshouses in s. 61; but a hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital. I do not think that the words "public school" in this Act must be construed as words of art. The question is what is the common understanding of those words, and that is a question not of law but of fact. In many senses the City of London School is a public school according to common understanding; and if some charitable element be necessary in order to satisfy the words creating the exemption, that element exists. Looking at all the facts before the commissioners, I am of opinion that they might reasonably come to the conclusion that this was a public school within the meaning of the Act, and I think, therefore, that their decision was right.

HAWKINS, J. I am of the same opinion.

Judgment for the respondents.

Solicitor for appellant: *The Solicitor for the Inland Revenue.*
Solicitor for respondents: *The City Solicitor.*

W. A.

Followed. In re A DEBTOR (No. 41 of 1951) [1952] 1 Ch. 192

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Dec. 7, 21.

IN RE WINTERBOTTOM. EX PARTE WINTERBOTTOM.

Bankruptcy — Bankruptcy Notice — Company—Liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 133—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4.

By the Companies Act, 1862, ss. 95 and 133, a liquidator appointed in the voluntary winding-up of a company is empowered "to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company."

A liquidator appointed in the voluntary winding-up of a company served upon a judgment debtor of the company a bankruptcy notice headed "Ex parte N., liquidator of the M. Bank, Limited." In the body of the notice the debtor was required to pay to N., "the liquidator of the bank," the sum "claimed by him" as the amount due on the judgment, or to secure or compound for the same sum "to his satisfaction," &c. The debtor was not in any way misled by the terms of the notice:—

Held, that the form of the notice must comply strictly with the provisions of s. 95, a substantial compliance not being sufficient, and therefore, that the notice, not being in the name of the company, was bad.

Per Cave and Wills, JJ. The liquidator appointed in the voluntary winding-up of a company may serve a bankruptcy notice, under the Bankruptcy Act 1883, upon a judgment debtor of the company.

APPEAL against a receiving order made by the registrar of the County Court at Oldham.

The facts and arguments are sufficiently stated in the judgment of the Court.

Cooper Willis, Q.C., for the appellant.

J. L. Walton, for the respondents.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Cave and Wills, JJ.) was delivered by

CAVE, J.:—This is an appeal against a receiving order made by the County Court at Oldham under the following circumstances:—

On March 25, 1885, the Manchester and Oldham Bank, Limited, obtained a judgment by default against Winterbottom for 890*l.* Either before or subsequently, it does not appear which, but probably before, the bank went into liquidation, and the respondent

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was appointed liquidator. On September 16, 1886, the liquidator issued a bankruptcy notice in respect of this judgment debt of 890*l.*, which the debtor did not comply with, and thereupon on November 4, the receiving order now appealed against was made.

Now I think it cannot be doubted that a company may issue a bankruptcy notice. By s. 4, sub-s. (1) (*g*), of the Bankruptcy Act, 1883, a bankruptcy notice may be served by a creditor who has obtained final judgment.

By s. 168, unless the context otherwise requires, the word "person" includes a body of persons corporate or unincorporate. By s. 148, "for all or any of the purposes of this Act a corporation may act by any of its officers authorized in that behalf under the seal of the corporation." By rule 191 of the rules in force in September, 1886, provision is made for presenting a bankruptcy petition, or issuing out a bankruptcy notice, by the few remaining companies authorized to sue and be sued in the name of their public officer. It was contended, however, that although a company might serve a bankruptcy notice, the liquidator of the company in liquidation could not do so, or at any rate could not do so in the manner adopted in this case. The first objection is one of substance, the latter one of form. In support of the contention that the liquidator could not serve the notice at all *Guthrie* v. *Fisk* (1) was cited. In that case it was held that a private Act of Parliament, enabling a certain insurance society to commence all actions and suits in the name of their secretary as nominal plaintiff, did not authorize the secretary to petition on behalf of the society for a commission of bankruptcy against their debtor. This particular objection is removed in the present Act by rule 258; but it was submitted that, although the disability was removed by that rule so far as regards companies authorized to sue and be sued in the name of a public officer, it still existed so far as a liquidator of a registered company was concerned, and in support of that view *Williams* v. *Harding* (2) was cited. In that case it was held that, under the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108, the official manager to whom calls were ordered to be paid did not in virtue of such order become a

(1) 3 B. & C. 178. (2) Law Rep. 1 H. L. 9.

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creditor of the person who had to pay the calls so as to be entitled to be a petitioning creditor and to ask for an adjudication in bankruptcy against him. It is obvious that a decision under a repealed Act as to the position of the official manager towards a contributory of the company can be of very little assistance in determining the powers of a liquidator under a different Act as to serving a bankruptcy notice on a judgment debtor of the company. Turning then to the Act itself—the Companies Act, 1862 (25 & 26 Vict. c. 89)—we find that by s. 133 under the voluntary winding-up of a company upon the appointment of liquidators all the powers of the directors shall cease, except so far as the company or the liquidator may sanction the continuance of such powers; and the liquidators may, without the sanction of the Court, exercise all the powers by that Act given to the official liquidator. By s. 95 the official liquidator may, with the sanction of the Court, "bring or defend any action, suit, or prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company." I am of opinion that the power to bring any other legal proceeding includes the power to serve a bankruptcy notice, because that seems to be the natural meaning of the words, and I am not aware of any reason why they should not have their ordinary and natural meaning. But it is said that, assuming the liquidator has power under the sections cited to serve a bankruptcy notice in the name and on behalf of the company, he has not in this case complied with the terms of that power. By rule 119 of the Bankruptcy Rules, 1883, "a creditor desirous that a bankruptcy notice may be issued shall produce to the registrar an office copy of the judgment on which the notice is founded, and file the notice together with a request for issue, which shall be in form No. 5 in the Appendix, with such variations as circumstances may require." By rule 120 "every bankruptcy notice shall be indorsed with the name and place of business of the solicitor actually suing out the same, or if no solicitor be employed with a memorandum that it is sued out by the creditor in person. There shall also be indorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have

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set up in the action in which the judgment was obtained, he must within the time specified in the notice file an affidavit to that effect with the registrar." By rule 118, "a bankruptcy notice shall be in the Form No. 6 in the Appendix, with such variations as circumstances may require."

It is remarkable that the form contains not only the notice required to be indorsed by rule 120, but also a similar notice within, but slightly different. The form runs, "or you must satisfy the Court that you have a counter-claim, set-off, or cross demand against C. D. which equals or exceeds the sum claimed by him." The indorsement runs, "If, however, you have a counter-claim, set-off, or cross-demand which equals or exceeds the amount claimed by C. D. in respect of the judgment," &c.

The request for the issue of the notice is made by the solicitor for Nicholson, who is described as the liquidator of the Manchester and Oldham Bank, Limited, and purports to be founded on the judgment obtained by the bank on March 25, 1885.

The notice itself is headed, "In the matter of John Winterbottom, Ex parte Henry Grosvenor Nicholson, liquidator of the Manchester and Oldham Bank, Limited." It requires the debtor to pay to Nicholson, "the liquidator of the Manchester and Oldham Bank, Limited," the sum of 890*l.* "claimed by him as being the amount due on a final judgment obtained by the said bank against you in the Queen's Bench Division of the High Court, dated the 25th of March, 1885, whereon judgment has not been stayed, or you must secure or compound for the said sum to his satisfaction, or the satisfaction of the Court, or you must satisfy the Court that you have a counter-claim, set-off, or cross-demand against the said Nicholson which equals or exceeds the sum claimed by him, and which you could not set up in the action in which judgment was obtained."

It is contended that neither the request nor the notice were in the name and on behalf of the bank within the meaning of s. 95 of the Companies Act, 1862, and the case of *In re Hodges* (1) was referred to. There a debtor's summons, taken out under the Act of 1869 by the secretary of a limited company for a debt due to the company, was dismissed, Lord Selborne remarking that the

(1) Law Rep. 8 Ch. 204.

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summons was a special statutory proceeding involving important consequences, and all proper forms must be strictly complied with. That case, no doubt, is a stronger case of irregularity than the present one, seeing that a secretary, who is the mere servant of the company, bound to obey the orders of the directors, occupies a very different position from a liquidator who has concentrated in him all the powers of the directors; but it is important as shewing that where a formal compliance is required a substantial compliance is insufficient. Here the 95th section of the Companies Act, 1862, requires that the proceeding should be taken "in the name and on behalf of the company," and I think that different considerations apply to those two requirements. As to the proceeding being taken on behalf of the company, I do not think, looking at the Act and forms, that it is necessary to state in so many words that the proceeding is taken on behalf of the company, if this appears by necessary intendment from the documents, and I think that it does so appear in this case. In the request Nicholson is described as the liquidator of the bank, and the request is founded upon a judgment obtained by the bank, with which Nicholson does not appear on the face of the request to have any other connection than as liquidator of the bank. The notice requires the debtor to pay to Nicholson, the liquidator, 890*l.* claimed by him as being the amount due on a final judgment obtained by the bank. To my mind it is impossible on reading these documents to come to the conclusion that Nicholson was taking these proceedings otherwise than on behalf of the bank. I do not understand how any one could suppose that he was taking them on his own behalf.

There is, however, the other requirement, which is essentially of a formal nature, namely, that the proceeding shall be taken in the name of the company; and although I have struggled against the conclusion, feeling as I do that the debtor has in no way been misled (as appears from his affidavit), yet I have ultimately come to the conclusion that this requirement has not been complied with. The request is made by F. H. Smyth, "solicitor for H. G. Nicholson, of, &c., the liquidator of the Manchester and Oldham Bank, Limited." Possibly this might have been got over, but the notice, the document actually served on the debtor, is headed

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"Ex parte Henry Grosvenor Nicholson, liquidator of the Manchester and Oldham Bank, Limited," and looking at the heading and at the contents I am unwillingly compelled to come to the conclusion that it is a proceeding taken in the name of Nicholson the liquidator, and not in the name of the company.

The proper form, therefore, has not been strictly complied with, and the appeal must be allowed and the receiving order set aside with costs.

Appeal allowed.

Solicitors for appellant: *Johnson & Weatherall.*

Solicitors for respondents: *Jaques & Co.*

W. A.

[IN THE COURT OF APPEAL.]

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March 1.

RICHARDS *v.* JENKINS.

Practice—Interpleader—Goods taken in Execution—Right of Third Party.

On an interpleader issue with regard to goods taken in execution, where the evidence shews that the claimant had not any interest in nor the possession of the goods at the time of seizure, but they belonged to a third person, the execution creditor is entitled to succeed.

On an interpleader issue between the execution creditor and a claimant the facts were as follows:—The claimant, having let the goods afterwards taken in execution for hire, became bankrupt. He did not inform the trustee in bankruptcy that he owned these goods, and the hirer of the goods, being unaware of the bankruptcy, continued to pay the claimant money for the hire of them. The goods, while in the possession of the hirer, were taken in execution under a judgment against him:—

Held, affirming the judgment of the Queen's Bench Division (1), that upon the above facts, assuming the execution debtor to be estopped from denying that the goods were the claimant's, such estoppel did not bind the execution creditor, and the claimant had no title to the goods as against the execution creditor, who was therefore entitled to judgment on the issue.

APPEAL from the judgment of the Queen's Bench Division. (1)

On an interpleader issue in a county court the facts were as follows:—

The plaintiff in the issue, the claimant, had prior to 1884 made a demise of a brickyard, and had let therewith certain personal chattels, which formed the subject of the interpleader.

(1) 17 Q. B. D. 544.

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In 1884 the plaintiff became bankrupt, but he did not inform the trustee in bankruptcy that he owned these goods, and the tenant of the brickyard, one Williams, being unaware of the plaintiff's bankruptcy, continued to pay him money for the hire of the goods.

The defendant, the execution creditor, having recovered a judgment against Williams, the before-mentioned goods were, whilst in his possession, taken in execution under a fieri facias issued upon such judgment; and, the plaintiff having claimed them, an interpleader issue was directed in the county court. The county court judge gave judgment for the plaintiff on the ground that the defendant could not set up the title of the trustee in bankruptcy. Against this judgment the defendant appealed.

The Queen's Bench Division (Wills and Grantham, JJ.) reversed the decision of the county court judge, and gave judgment for the defendant.

R. Vaughan Williams, for the plaintiff. The question is whether the execution creditor in this case can set up the right of a third party, who has not intervened in any way, to defeat the claimant.

It is admitted that the onus of proving that the goods are his, as against the execution creditor, is on the claimant, so that, if no evidence is given, the finding on the issue must be for the execution creditor; but, if the claimant has given evidence of a possessory title as against the execution creditor, the latter cannot displace that evidence by proving a better title in a third person. Possession or its equivalent is a good title as against all the world but the rightful owner: if, therefore, the goods are shewn not to be the execution debtor's, and the claimant had possession of them or its equivalent at the time when they were seized, the claimant has sustained the burden of proof that lay upon him, and it is immaterial that a third person was the true owner of the goods. The sheriff is not authorized by the writ of fi. fa. to seize any goods but those of the execution debtor, and, if the goods seized were not his, the execution creditor cannot take advantage of the infirmity of the title of a person in possession of the goods.

The procedure under the Interpleader Acts upon a sheriff's interpleader is intended only for the relief of the sheriff and does not confer any new rights as between the execution creditor and a claimant. The question in the issue, therefore, is the same as that which would arise in an action against the sheriff by the claimant. The sheriff being only authorized by the writ to seize the judgment debtor's goods, a possessory title would be sufficient to enable a claimant to recover against him in trover. It is contended that any act of ownership or exercise of the rights of an owner in respect of the goods constitutes evidence of ownership as against a stranger, and the execution creditor cannot defeat such evidence by setting up the jus tertii. There was evidence of a title in the nature of a possessory title in the claimant as against the execution creditor, for the claimant was in receipt of rent for the goods from the execution debtor, who thereby recognised the claimant's title to their possession as soon as the lease was determined. An act done by the bailee of goods in derogation of the title of the bailor determines the bailment: and a seizure of the goods on an execution against the bailee has the same effect. Immediately on the seizure of the goods by the sheriff the bailment of the goods to the execution debtor would be determined; and the plaintiff would be entitled to the possession of the goods as against the execution debtor and therefore as against the sheriff and the execution creditor, who must for this purpose stand in the same position as the execution debtor as claiming through him. A bankrupt is capable of holding property until the trustee in bankruptcy intervenes: *Herbert* v. *Sayer*. (1) He cited *Edwards* v. *English* (2); *Carne* v. *Brice* (3); *Green* v. *Stevens* (4); *Green* v. *Rogers* (5); *Richards* v. *Johnston*. (6)

Glascodine, for the defendant. The goods were in the possession of the execution debtor, and therefore primâ facie they were his, and the sheriff was entitled to suppose them to be his and to seize them. The question on the interpleader issue is not whether the goods were really the execution debtor's, but whether

(1) 5 Q. B. 965.
(2) 7 E. & B. 564; 26 L. J. (Q.B.) 193.
(3) 7 M. & W. 183.
(4) 2 H. & N. 146.
(5) 2 C. & K. 148.
(6) 4 H. & N. 660.

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they are the goods of the claimant as against the execution creditor. The claimant, therefore, must on such issue shew affirmatively that he has some title to or interest in the goods as against the execution creditor. The expression "setting up the jus tertii" is inaccurate as applied to such a case. If it appear on the facts that the claimant has no title to the goods, he must fail. The claimant had no title to or interest in the goods, the real title to them being in the trustee in bankruptcy. The claimant was not in possession of the goods, and had therefore no possessory title to them. The very most that can be contended is, that there was an estoppel as against the execution debtor by which he would be prevented from denying the claimant's title to the goods. But the case of *Richards* v. *Johnston* (1) shews that the execution creditor does not claim through or under the execution debtor in such a sense that there would be privity between them for this purpose and the execution creditor would be bound by an estoppel against the execution debtor. Furthermore, it is contended that there would not even be an estoppel as against the execution debtor in this case. It is always open to the bailee of goods to shew that since the bailment the title of the bailor has determined, just as a tenant can shew that since the demise his lessor's title has determined: and the payment of the rent for the goods since the bankruptcy cannot work an estoppel, because such payment was made by the execution debtor in ignorance of the fact of the bankruptcy: *Fenner* v. *Duplock*. (2) He also cited *Chase* v. *Goble* (3); *Belcher* v. *Patten* (4); *Gadsden* v. *Barrow*. (5)

R. Vaughan Williams, in reply, cited *Betteley* v. *Reed* (6); *Biddle* v. *Bond* (7); *Thorne* v. *Tilbury*. (8)

LORD ESHER, M.R. In this case I cannot but think that the judgment of the Court below was, in one respect, not quite correctly expressed. I have had an opportunity of speaking with Wills, J., by whom the judgment was delivered, and I do not think that he

(1) 4 H. & N. 660.
(2) 2 Bing. 10.
(3) 2 M. & G. 930.
(4) 6 C. B. 608; 18 L. J. (C.P.) 69.
(5) 9 Ex. 514; 23 L. J. (Ex.) 134.
(6) 4 Q. B. 511.
(7) 6 B. & S. 225; 34 L. J. (Q.B.) 137.
(8) 3 H. & N. 534; 27 L. J. (Ex.) 407.

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himself is now of opinion that the case was quite correctly put so far as the expression to which I allude is concerned. The judgment of the Queen's Bench Division seems to say that the execution creditor, on putting in the execution, is to be looked upon as himself in possession of the goods, and that, he being so in possession, the burden lies on any one claiming against him to make out a title as against his possession. I do not think that is the right view. The execution creditor has never been in possession of the goods. The actual possession is that of the sheriff, who is not a mere bailiff of the execution creditor but acts in obedience to the judgment of the Court and as its officer. The goods taken in execution are, therefore, not in the possession of any party, but of the law. For these reasons I cannot think that in this respect the case was put precisely on the right footing in the court below, but the judgment may, nevertheless, be right when the case is looked at from a somewhat different point of view.

The question arises on an interpleader issue in which the claimant was the plaintiff and the execution creditor the defendant; and the goods seized in execution were at the time when seized in the possession of the execution debtor. The issue is in form whether the goods are the goods of the claimant as against the execution creditor. The first point is in reference to what moment of time that question is to be supposed to be asked, whether immediately before or immediately after the seizure. The expression used in the issue is "at the time of the execution." The meaning must be that the question is to be asked with relation to the moment before the sheriff seizes. The issue is whether the goods are then the goods of the claimant as against the execution creditor, so as to prevent the execution creditor's having a right to require the sheriff to seize them. Such, then, being the meaning of the issue, how can the goods be the goods of the claimant as against the execution creditor, unless the claimant has some title to or interest in the goods? Suppose, when the issue comes on for trial, it is proved that the goods were in the possession of the execution debtor the moment before they were seized, as in the present case, and the claimant is unable to give any further evidence, and no further evidence is given by either party. In

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whose favour ought the issue then to be determined? The possession of the execution debtor would, in the absence of any other evidence, be primâ facie evidence that the goods were his, and on that footing the seizure of them in execution would be right, and there would be nothing to shew that the claimant had any claim to the goods. But suppose the claimant went further and gave some evidence which, however, shewed conclusively that he had absolutely nothing to do with the goods, and that his claim was altogether unfounded. The result obviously would be that in that case also the issue must be determined in favour of the execution creditor. The question on the facts here proved must be whether the claimant has any interest in the goods. It must be necessary for him to shew that he has some interest, for, if he has none, the evidence must be conclusive in favour of the execution creditor. What interest, then, if any, is it shewn here that the claimant had in the goods the moment before they were seized in execution? The goods had been his when he let them to Williams. But they had ceased to be his long before the sheriff seized them: for he had become bankrupt and all his property had passed to the trustee in his bankruptcy. At the time of the execution the goods belonged to the trustee, and he had absolutely no legal or equitable interest whatever in them. What, then, was his position as to the goods? I will assume, as was contended, that the execution debtor was estopped from saying that the goods were not the claimant's, and that, if the claimant had brought an action against the execution debtor in respect of the hire of the goods, the execution debtor, having been put into possession of the goods by the claimant before the bankruptcy, would, in the absence of any intervention by the trustee in bankruptcy, have had no defence. I do not decide that it would be so. I will assume it. But even then there would be merely an estoppel between those parties, and such an estoppel would give the claimant no real title to or interest in the goods. Such an estoppel merely prevents the party who is estopped from saying as against some other party that the goods do not belong to such other party, though in fact they do not belong to him; and it only takes effect as between parties and privies. If the execution creditor could for this purpose be said to claim through

and under the execution debtor so as to be in privity with him, he might be estopped. But I do not think he can be said so to claim; he claims through and by the law as against the execution debtor and not through and under him. That appears to me to be the effect of what was said by the judges in *Richards* v. *Johnston* (1), though no doubt that case was not on all fours with the present. Pollock, C.B., says: "a sheriff who comes to seize the goods of a debtor, armed with a writ of execution in favour of a creditor, is not bound by estoppels which might have prevented the debtor himself from claiming the goods." Martin, B., after saying that, if an action of trover had been brought against the judgment debtor by the claimant, the judgment debtor would have been estopped, says: "but no authority has been cited to shew that a judgment creditor is party or privy to the acts of the judgment debtor. The fi. fa. directs the sheriff to seize the goods of the debtor. The sheriff is a stranger to the debtor, and the only question for him is—Are these goods the goods of the debtor or not? Therefore on this rule we must say that the sheriff and the execution creditor are not bound by the estoppel which would affect the execution debtor." The judgment of Watson, B., contained similar expressions. The ground on which this case was decided seems to me to be a strong authority to shew that neither the sheriff nor the execution creditor can be affected by such an estoppel as between the execution debtor and the claimant. The result is that the facts shew that at the moment before the execution the claimant had no interest whatever in the goods: there was at most nothing but an estoppel as between him and the execution debtor. Therefore the goods were not the property of the claimant as against the execution creditor, and the finding on the issue ought to be in favour of the defendant. Therefore I come in the result to the same conclusion as the Court below, though, as I have already said, I differ from some of the expressions which they have used; and I believe I have the authority of Wills, J., for saying that, upon the matter being brought to his notice, he agrees that the part of the judgment which speaks of the execution creditor as being in possession of the goods is not quite correctly put. It

(1) 4 H. & N. 660.

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seems to me that that is so for two reasons: first, because the execution creditor is not in possession of the goods; and secondly, because that way of putting the case refers the question asked by the issue to the moment after instead of the moment before the execution. For these reasons I think the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion and for the same reasons. I only wish to add that it appears to me that the judges below in stating their view adopted certain popular expressions to be found in some of the cases on the subject; but that in substance there was nothing in the view they took which is at variance with the conclusion at which we have arrived.

FRY, L.J. I agree. The question we have to answer is whether the goods at the time of the seizure were the property of the claimant as against the execution creditor. It seems to me clear that the claimant had at that time no property in the goods. At the utmost he had only a right by way of estoppel against the execution debtor. Assuming that he had that, such an estoppel is only effective as between parties and privies. In my opinion the execution creditor is not a party or privy to the estoppel, and is not bound by it. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff: *Carter & Church, for Evans & Sinnett.*

Solicitor for the defendant: *R. White for J. R. Richards.*

E. L.

[IN THE COURT OF APPEAL.]

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Feb. 21, 22.

THE EBERLE'S HOTELS AND RESTAURANT COMPANY, LIMITED, *v.* E. JONAS & BROTHERS.

Bankruptcy—Winding-up of Company—Mutual Dealings—Claim to Return of Goods pledged—Detinue—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 38—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 158.

The plaintiff company had deposited cigars with the defendants to secure a debt. An order for winding up the company was afterwards made, and, the secured debt having been paid off, the liquidator of the company claimed a return of the cigars, but the defendants refused to give them up. The liquidator brought an action of detinue for the cigars.

Their value having been assessed in the action, the defendants claimed by way of counter-claim to set off another debt due from the company to them against such value by virtue of the conjoint effect of s. 38 of the Bankruptcy Act, 1883 (the "mutual dealings" section), and s. 10 of the Judicature Act, 1875, which applies the rules of bankruptcy law to cases of winding-up:—

Held, that they were not entitled to do so on the ground that s. 38 is only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of the plaintiffs was to a return of the goods.

APPEAL from the judgment of Mathew, J.

The action was by the liquidator of a company in the course of winding-up for the wrongful detention of certain cigars. The defendants counter-claimed for the price of cigars supplied by them to the company.

At the trial before the learned judge without a jury the facts appeared to be as follows: The defendants had on various occasions supplied cigars to the plaintiff company, and were pressing the company for payment of 800*l.*, the price of a certain portion of the cigars so supplied. The defendants offered, if the company would pay 200*l.* on account of the price of these cigars immediately, to accept payment of the balance of 600*l.* by monthly instalments of 100*l.* to be secured collaterally by the deposit of 500*l.* worth of cigars by the plaintiff company to be held by the defendants till payment of the balance. The plaintiff company did accordingly send certain cigars to the defendants and wrote them to the effect that they would be obliged if the defendants could dispose of the cigars and put the proceeds to

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their credit. At the time when this transaction took place the plaintiff company were also indebted to the defendants to the extent of 280*l.* for cigars supplied other than those to secure the price of which the deposit was made. An order was subsequently made for winding up the company. At the date of such order only 200*l.* remained due of the debt in respect of which the deposit of cigars was made. This balance of 200*l.* having been subsequently paid, the liquidator claimed from the defendants a return of the cigars which, with the exception of a very few that had been sold, remained in their possession. The defendants refused to return them. The defendants claimed at the trial that they were entitled to have the value of the cigars and the debt of £280 due to them set off against one another under s. 38 of the Bankruptcy Act, 1883. It was not disputed that the assets of the company were insufficient to meet its liabilities and that therefore s. 10 of the Judicature Act, 1875, applied. The learned judge ordered a reference to a master to assess the value of the cigars. The master assessed the value of the cigars accordingly at 135*l.* The learned judge subsequently held that the 38th section was applicable, and that, on stating the account under that section, the plaintiffs on the one side were entitled to credit for the 135*l.*, plus the price of the few cigars sold by the defendants and interest on the 135*l.* from the date of the demand for the return of the cigars, and the defendants on the other to their debt of 280*l.*, leaving a balance in favour of the defendants of 110*l.* 12*s.* 10*d.*, for which he gave the defendants judgment.

Against this judgment the plaintiffs appealed, claiming by their notice of appeal that it should be varied by ordering that the plaintiffs should have judgment for the return of the cigars without giving the defendants the option of retaining the same upon paying their value, and that the counter-claim should be dismissed without prejudice to the defendants' right (if any) to prove for their debt of 280*l.* in the winding up.

French, Q.C., and *T. Ribton*, for the plaintiffs. Sect. 38. of the Bankruptcy Act, 1883, is inapplicable to this case. The case is not one of mutual dealings within the section. Upon the

payment of the secured debt the plaintiffs were entitled to a return of the cigars, the general property in which had always remained and still remains in them. The subsequent detention of the cigars by the defendants was a tort. A claim arising out of a tort does not come within the section, because it cannot be said to arise from a "dealing" within the meaning of the term as there used. This claim does not arise out of a mutual dealing, but is the result of an interference with a right of property.

Again the 38th section only applies where the claims on both sides are such as would be proveable in bankruptcy. The balance under that section is proveable, and therefore the items on each side ought to be so. A claim for damages in respect of a tort is not proveable in bankruptcy, for s. 37 provides that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be proveable in bankruptcy. The term "mutual dealings" was introduced to extend the operation of the "mutual credit" provisions to cases of unliquidated damages for breach of contract, which were not previously included: *Rose* v. *Hart* (1); *Booth* v. *Hutchinson* (2); *Peat* v. *Jones* (3); *Mersey Steel and Iron Co.* v. *Naylor* (4). It was not intended to include by that term a claim to damages for a tort.

Moreover the right of the plaintiffs in the action of detinue is to recover the goods which are their property in specie and not merely to their estimated value or to damages. The action is not merely for breach of a contract of bailment, it is in respect of the wrongful detention of property, and to recover possession of such property. Therefore, the plaintiffs' claim is not a mere money claim, and consequently cannot come within the operation of s. 38, which can only in the nature of things be applicable to a case where there are money claims on each side, and an account can be taken: *Ex parte Roy, In re Sillence* (5); *Ex parte Caldicott, In re Hart* (6); *In re Winter, Ex parte Bolland* (7). *In re Scarth* (8) decided that, where a verdict at law had been obtained

(1) 8 Taunt. 499.
(2) Law Rep. 15 Eq. 30.
(3) 8 Q. B. D. 147.
(4) 9 Q. B. D. 648; 9 App. Cas. 434.
(5) 7 Ch. D. 70.
(6) 25 Ch. D. 716.
(7) 8 Ch. D. 225.
(8) Law Rep. 10 Ch. 234.

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for 100*l.* in default of delivery of a chattel to the plaintiff, he could not before issuing execution be considered a creditor for the 100*l.* The cigars were deposited to secure a debt, and the plaintiffs were entitled to possession of them on the satisfaction of that debt. The practical effect of the defendants' contention would be in cases of bankruptcy or winding-up to enable creditors holding security to tack unsecured debts to secured. The parties by the terms of the agreement between themselves have excluded the operation of the mutual dealings clause, inasmuch as the goods are to be returned in specie on the satisfaction of the secured debt: *Key* v. *Flint* (1); *Buchanan* v. *Findlay* (2); *Ex parte Flint* (3); *In re Raggett, Ex parte Williams* (4); *Young* v. *Bank of Bengal* (5). They also cited *Ex parte Price, In re Lankester* (6); *Ex parte Fletcher, In re Vaughan* (7); *Jack* v. *Kipping.* (8)

Witt, (*Finlay, Q.C.*, with him), for the defendants. The 78th section of the Common Law Procedure Act, 1854, and Order XLVIII., r. 1, which is substantially a reproduction of the same provision, give power to the judge to order execution for the return of the specific chattel in an action of detinue, but the exercise of that power is discretionary. He is not bound to exercise it, if he thinks justice will be done by payment of the value of the chattels. In the absence of such an order the judgment in an action of detinue is not in substance a judgment for the recovery of the specific goods.

[BOWEN, L.J., referred to *Peters* v. *Heyward* (9); Fitzherbert, Nat. Brev. 138.]

At common law the unsuccessful defendant in an action of detinue had the option of retaining the goods on paying the assessed value of them. So that practically, when the judge declines to exercise the power given by Order XLVIII., the result of the action is a mere money claim to the value of the goods as assessed by the jury. This is not a case in which

(1) 8 Taunt. 21.
(2) 9 B. & C. 738.
(3) 1 Sw. 30.
(4) 16 Ch. D. 117.
(5) 1 Moo. P. C. 150.
(6) Law Rep. 10 Ch. 648.
(7) 6 Ch. D. 350.
(8) 9 Q. B. D. 113.
(9) Cro. Jac. 683.

equity would compel delivery of the specific goods, there being nothing special or peculiar in their nature, and there being no fiduciary relation between the plaintiffs and defendants.

The 10th section of the Judicature Act, 1875, applies to the case of winding-up a company the machinery and rules of bankruptcy, but it does not confine the application of those rules to matters proveable in bankruptcy. The effect is that the provisions of s. 38 of the Bankruptcy Act, 1883, are applicable in the case of all claims proveable in a winding-up. By the 158th section of the Companies Act, 1862, all claims sounding in damages are proveable in a winding-up, whether arising out of contract or tort. Therefore, the damages in an action of detinue are proveable in a winding-up and s. 38 is applicable to them.

[FRY, L.J.:—Suppose in the case of a mortgage of goods, after the winding-up order the liquidator had brought an action for redemption, could the mortgagees have availed themselves of an unsecured debt due to them from the company under the mutual credit clause by way of defence to that action? The concluding words of Lord Selborne's judgment in *Ex parte Caldicott* (1) seem to suggest that the mutual credit clause does not apply to the case of securities for a specific debt.]

The claim in an action for redemption would be to redeem the specific chattels, but the contention is that in detinue, where the judge refuses to order delivery of the chattels, the result of the claim is substantially a money demand.

[FRY, L.J.:—But must not the applicability or otherwise of the mutual dealings clause depend on the state of things at the time of the winding-up? At that time there is a right to the delivery of the cigars on payment of the outstanding balance of the secured debt on the one side and to payment of a debt on the other. How can a balance be struck between them?]

The same consideration would apply to unliquidated damages for a breach of contract. They could not be brought into account till assessed, and yet it is clear, if the plaintiffs' claim had been for such damages, the defendants could avail themselves of s. 38.

[LORD ESHER, M.R.:—There both claims must end in a

(1) 25 Ch. D. 716.

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pecuniary liability. Can the applicability of s. 38 depend on what the judge may do at the trial? Must it not depend on the nature of the respective rights of the parties antecedently to the action?]

Ribton, in reply. In *Ex parte Drake, In re Ware* (1), it was held that the judgment in an action of detinue does not change the property in the chattels before satisfaction of the judgment.

LORD ESHER, M.R. In this case the liquidator of a company, which is being wound up, has brought an action of detinue against the defendants in respect of certain cigars which had been deposited by the company with the defendants as security for a debt; and his contention is that, the debt having been paid off, and the cigars still being in the defendants' possession, they are bound to deliver them up to the liquidator himself as representing the company. By way of counter-claim the defendants answer that the company in liquidation owes them a sum of 280*l.* for goods supplied; and they assert that they are not bound to return the cigars, but are entitled, by virtue of the statutory provisions with regard to mutual dealings in the case of the winding-up of a company, to set off against the money value of the goods detained the debt to them from the company. The conclusion at which I have arrived in this case does not depend on the question whether the plaintiffs' claim is one which would be proveable in a case of bankruptcy under s. 37 of the Bankruptcy Act, 1883. If such a claim as that made by the plaintiffs were proveable under s. 158 of the Companies Act, 1862, and there were no other difficulty in the way, the case might come within the terms of s. 38. But the ultimate question must be whether the facts of this case are such that the provisions of s. 38 can be applicable to them. If they are, then the section may be applicable in the case of a winding-up, though it would not be applicable to similar facts in a case of bankruptcy. This question depends on the words of the section. It provides for the case "where there have been mutual credits, mutual debts, or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act, and any other

(1) 5 Ch. D. 866.

person proving or claiming to prove a debt under such receiving order." The terms of the section do not include the case of a company being wound up, but by the Judicature Act the procedure under the section is made applicable to the winding-up of a company. So that, so far as the character of the respective parties is concerned, the section would be applicable. Then is this a case of mutual dealings? On the one side there was the deposit of goods to secure a debt. There are, no doubt, matters which give rise to claims, but are not dealings within the section. If one man assaults another or injures him through negligence, that gives rise to a claim, but is not a dealing; but I am disposed to think that whatever comes within the description of an ordinary business transaction would be a dealing within the section. I think it was a dealing where one party deposited goods with the other to secure a debt. It is obvious that the sale of goods by the defendants constituted a dealing. So I think there were mutual dealings between these parties. But we have to see whether even so the section applies. The section provides, where there are mutual dealings between the parties, that "an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively." Although there may be mutual dealings, and the parties are such as come within the terms of the section, it is obvious that its provisions cannot apply unless the dealings are such that in the result the account contemplated by the section can be taken in the way described. If the claim on one side in the action and the counter-claim on the other were such as would both result in a money claim, so that for the purposes of the action there would be merely a pecuniary liability on each side, the case would, I think, come within the section. I should, speaking for myself, desire to give the widest possible scope to the section, and, in my opinion, wherever in the result the dealings on each side would end in a money claim, its provisions would be applicable.

But the question is whether that is so here, and whether in this case such an account as is contemplated by the section can be

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taken. It is clear that the counter-claim is a mere money claim. But with regard to the nature of the plaintiffs' claim a somewhat difficult inquiry has become necessary. Mathew, J., has made the plaintiffs' claim result in a pecuniary liability, but the question on appeal before us is whether his decision in that respect was correct. These cigars were deposited to secure a debt with power to sell them at once, even before default in payment of the monthly instalments. If the defendants had sold them before the debt was paid, I am disposed to think that the plaintiffs' claim for an account of their proceeds would then have been a mere money claim. A trifling portion of them was so sold, but substantially they were not sold, and still remain in the possession of the defendants, and the debt in respect of which they were deposited has been satisfied. It appears to me that according to law and the terms of the contract between the parties the defendants have no longer any right to sell the goods, but are bound to return them to the plaintiffs. What, then, is the plaintiffs' remedy? They might perhaps have waived the tort and claimed in account the price of the goods, but they were not bound to do so. They were entitled to sue, and have sued, in detinue for the wrongful detention of the goods. What, then, is the nature of the claim and the judgment in that action? At common law the judgment was not merely for the value of the goods; it was primarily for a return of the goods, and only as an alternative, if that could not be had, for their value. So also the writ of execution to the sheriff seems to have been to distrain the defendant to deliver the goods, and only in the alternative for their value. There was no doubt the difficulty that, though the goods might remain in specie in the defendant's possession, it might be impossible, if the defendant preferred to keep the goods and pay their value, to procure a return of the goods from him; and to meet this difficulty power was given by the Common Law Procedure Act, 1854, s. 78, to order that execution should issue for the return of the chattel without giving the defendant the option of retaining such chattel upon paying the value assessed. But the judgment at common law was primarily for a return of the chattels detained. I do not think that Mathew, J., had a right to supersede that judgment, and, although the plaintiffs were entitled to the goods, and they were in the possession of the defendants and

could be returned, to make an order reducing the plaintiffs' claim to one for damages only. It seems to me that this case may be decided upon the common law with regard to the action of detinue without reference to the doctrines of equity with regard to enforcing the delivery of specific chattels. Whether a Court of Equity would in such a case have entertained a bill for the return of these goods or not, it clearly would not have interfered to prevent the enforcement of the common law remedy by action of detinue. Therefore the result of the plaintiffs' claim is not a mere money liability but a judgment for the return of the chattels detained. That being so, an account of what is due in respect of the mutual dealings, such as is contemplated by the 38th section of the Bankruptcy Act, 1883, cannot be taken. An account cannot be taken, and a balance struck in respect of a debt on one side and the liability to restore goods on the other. It seems to me, therefore, that, though there were mutual dealings, the case is not within the section, because in the result there is nothing in respect of which an account can be stated. If that is so, then on the one hand the plaintiffs are entitled to recover the goods, and on the other the defendants cannot support their counter-claim under the 38th section; all they can do is to prove in the winding-up for the amount of their debt. It appears to me that what was said in the judgment in *Mersey Steel and Iron Co.* v. *Naylor* (1) confirms the view I have expressd, because the decision of that case is there made to depend on the existence of pecuniary liabilities on both sides. For these reasons I think this appeal must be allowed as asked by the plaintiffs, and the judgment must be for the return of the goods, the defendants being left to prove for their debt in the winding-up.

BOWEN, L.J. I am of the same opinion. I agree with the contention that the question as to the effect of the 38th section of the Bankruptcy Act, 1883, upon the plaintiffs' claim in respect of these cigars must be considered with reference to the wider words of the 158th section of the Companies Act, 1862, and not merely to the question whether such a claim would be proveable in bankruptcy. I think that s. 10 of the Judicature Act, 1875,

(1) 9 Q. B. D. 648; 9 App. Cas. 434.

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applies the bankruptcy rules with regard to mutual credits and dealings to claims that are within the 158th section of the Companies Act, 1862. But assuming this to be so, the question remains whether such a case as this is capable of being treated in the manner prescribed by s. 38. That section prescribes the mode of proceeding where there are mutual dealings and sums due in respect thereof; and that mode of proceeding is only possible where an account can be taken in respect of sums due on either side, and the sum or sums due on one side set off against the sum or sums due on the other. How can an account be taken where the claim on one side is to a return of goods in specie, and the claim on the other side is a money claim? The two things are incommensurable. It seems to me that in truth the right of the plaintiffs is to have a return of specific goods which have always been and still remain their property. If that is the true nature of their claim, it cannot be set off against a mere money demand on the other side. That can only be done by doing violence to the nature of the plaintiffs' right. The judgment of Mathew, J., as it appears to me, does such violence; he has in substance compelled the plaintiffs to sell their legal right to the goods themselves for their value. The gist of the action of detinue is, that there is an unlawful detention by one man of another man's goods. It would, I think, be pedantic any longer to discuss the old question how far the action is in form an action of tort or one of contract. It may in form have been based upon a bailment, but the gist of the matter is the claim to the possession of goods of which the plaintiff is wrongfully deprived. The property in the goods remains in the plaintiff not merely down to judgment, but down to execution, as is shewn by the cases of *Ex parte Drake* (1) and *In re Scarth*. (2) The form of the judgment at common law is stated in Blackstone's Commentaries (16th ed. by Coleridge) p. 152, to be "that the plaintiff recover the said goods or (if they cannot be had) their respective values and also the damages for detaining them," and to the same effect is the old case of *Peters* v. *Heyward*. (3) It is true that the defendant had the power, though not the right, to defeat the claim to the specific goods, and, in the event therefore of its

(1) 5 Ch. D. 866.

(2) Law Rep. 10 Ch. 234.

(3) Cro. Jac. 683.

being impossible for the plaintiff to get re-delivery of the specific goods, the judgment was in the alternative for their value. But the right of the plaintiff was always to the possession of the goods, and to provide a remedy for this defect in the common law procedure s. 78 of the Common Law Procedure Act, 1854, was passed, which has been followed by Order XLVIII., to enable the judge to enforce delivery of the specific chattel detained. This provision does not, however, prove that the right of the plaintiff in an action of detinue, whose property had been wrongfully detained, was not to the return of the chattels themselves. Down to the present moment these cigars remain the property of the plaintiffs and ought to be returned to them; and, as it appears to me, the learned judge could not value them out in money and then say that they had only a money claim. In so deciding I think he overlooked the true nature of an action of detinue. I do not propose to express any opinion on the question whether this was a case in which a Court of Equity would have decreed a delivery of the specific chattels.

FRY, L.J. I am of the same opinion. Our decision in this case must, as it seems to me, depend on what is obviously the scope of the 38th section. It seems plain on looking to the terms of that section that, in order to be within it, the mutual dealings must be such as will result in an account in which sums due on one side may be set off against sums due on the other, and a balance struck. At the time, with reference to which the question whether the section applies must be determined, the right of the plaintiffs was to a return of the cigars in specie; and, as has been already pointed out, it is impossible to bring into an account cigars on one side and a debt on the other, and to strike a balance between them. As matters stood when the point first arose, the claims were incommensurable. This consideration is in no wise affected by the observation which I think was correctly made by the defendants' counsel to the effect that, in a case like this, the machinery given by s. 38 must be applied to matters proveable under the 158th section of the Companies Act. That may be so; but in no case can there be an account as between cigars and money. In order to state an account

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under s. 38, Mathew, J., has forcibly sold the plaintiffs' cigars to the defendants at the value fixed by the master. I do not think he was entitled to do so. I think the terms of the section must be applied to the claims as they originally existed, and that it was not the intention of the legislature that the claims should be affected for this purpose by such a proceeding subsequently taken in the action. A good deal has been said about the rights of the parties in equity, but it seems to me clear that, whether or not a Court of Equity would have entertained a bill for delivery of the specific chattels in such a case, it certainly would not have interfered to prevent the plaintiff from enforcing his title to the goods at common law in an action of detinue. It therefore seems to me immaterial to inquire whether equity would have decreed the delivery of the specific chattels. I should wish to make only one other observation. If we had taken a different view of the point on which our judgment turns, I think it would have been necessary very carefully to consider whether s. 38 applies to the case of a specific security given for a specific debt. The defendants in substance contend that they are entitled to add the debt of 280*l.* to the 600*l.* secured by the deposit of the cigars. I think it would require very mature consideration before we could decide in favour of that contention. The general course of practice both in bankruptcy and the winding-up of companies is intended to maintain the full rights of secured creditors to their security, if they choose to stand outside the proceedings. But it would be necessary to consider whether the language of the judgment in *Ex parte Caldicott* (1) does not indicate that the view of the judges who decided that case was that the legislature never intended by s. 38 to enlarge the rights of secured creditors so as to enable them to tack sums not secured to the sums secured. I express no opinion on this point. I only wish to say that I think it will require much consideration whenever it becomes necessary to decide it. For these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs: *Smith, Leavers, & Lewes.*
Solicitors for the defendants: *Lumley & Lumley.*

(1) 25 Ch. D. 716.

E. L.

[IN THE COURT OF APPEAL.]

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March 5.

OSBORNE *v.* MILMAN.

Prison—Committal of unqualified Person acting as Solicitor—"Criminal Prisoner"—Solicitors Acts: 6 & 7 *Vict. c.* 73, *ss.* 2, 32; 23 & 24 *Vict. c.* 127, *s.* 26—*Prison Acts:* 28 & 29 *Vict. c.* 126, *ss.* 4, 67; 40 & 41 *Vict. c.* 21, *s.* 41.

A person committed to prison under 6 & 7 Vict. c. 73, s. 32, for acting as a solicitor though not duly qualified is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4. Such a person is not entitled to be treated as a first-class misdemeanant by 40 & 41 Vict. c. 21, s. 41.

So *held*, reversing decision of Denman, J. (1)

APPEAL from the judgment of Denman, J. (1)

The facts were as follows:—

The plaintiff was committed to gaol for six months by an order of the Queen's Bench Division, under the provisions of 6 & 7 Vict. c. 73, s. 32, for having practised as a solicitor, though not duly qualified. He was accordingly arrested and imprisoned in Holloway gaol, of which the defendant was the governor, under a warrant which recited that he had been so committed. He was placed on the criminal side and treated while in prison as a convicted criminal not sentenced to hard labour. He contended that he ought to have been treated as a misdemeanant of the first division, and sued the defendant for damages for false imprisonment and trespass in respect of his having been subjected to labour, which though not hard labour was labour to which he would not have been subjected if he had not been placed on the criminal side of the prison. The learned judge gave judgment for the plaintiff.

Sir R. E. Webster, A.G., and *Danckwerts*, for the defendant. By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 4, a "criminal prisoner" is defined to be "any prisoner charged with or convicted of crime," and such prisoners are to be treated as provided by the Act. A prisoner committed for contempt of Court is to be treated as a first-class misdemeanant; and a first-class misdemeanant is by s. 67 not to be deemed a criminal prisoner.

(1) 17 Q. B. D. 514.

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The question is whether the plaintiff ought to have been treated as a "criminal prisoner" not sentenced to hard labour, or as a first-class misdemeanant. It is submitted that he was a prisoner convicted of a crime. The provisions of s. 2 of 6 & 7 Vict. c. 73, prohibit the acting as a solicitor by an unqualified person; and it is clear that a person contravening the provisions of that section would be guilty of a misdemeanor. The plaintiff might therefore have been indicted for a misdemeanor. Sect. 32 of 6 & 7 Vict. c. 73 (1) gives to any of the superior Courts in the particular case with which it deals, viz., where a solicitor and unqualified person are proceeded against together, a summary power of punishing such misdemeanor as an alternative to the proceeding by indictment, but the summary proceeding is clearly criminal in its nature, and not merely in the nature of a proceeding for contempt; because the power is not given merely to the Court against which a contempt may have been committed, but to any of the superior Courts in which the solicitor proceeded against together with the unqualified person has been admitted. No doubt the 35th section of the Act, since repealed by the Statute Law Revision Act, 1874, makes it a contempt of Court for an unqualified person to sue out any writ or process, or otherwise to act as a solicitor in any superior Court, but that provision was only cumulative. And the same observation applies to the existing provision of the 26th section of 23 & 24 Vict. c. 127.

The learned judge below seems to have thought that the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 41, applied. That section provides that "Any person who shall be imprisoned under any rule, order, or attachment for contempt of any Court shall be treated as a misdemeanant of the first division." But it is

(1) Sect. 32 in substance provides that, if any solicitor shall wilfully and knowingly act as agent in any action or suit in any court for any person not duly qualified to act as a solicitor, or permit his name to be used in any such action or suit, or do any other act to enable such unqualified person to appear, act, or practise in any respect as a solicitor, then on complaint made in a summary way to any of the superior Courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath, every such solicitor so offending shall and may be struck off the roll, and in that case "it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any term not exceeding one year."

contended that the true construction of the section is that the words "for contempt of any Court" govern the whole and apply to the words "rule" and "order" as well as the word attachment."

They cited *Reg.* v. *Buchanan* (1); *Abercrombie* v. *Jordan* (2); *Cattell* v. *Ireson.* (3)

Crump, Q.C., Wildey Wright, and *Richards,* for the plaintiff. It is contended that the proceeding under s. 32 of 6 & 7 Vict. c. 73, is in the nature of a proceeding for contempt, and not of a criminal proceeding. It may be that s. 2 creates a crime which would be punishable on indictment as a misdemeanor; but it does not follow that, when the act forbidden by s. 2 is proceeded against under s. 32 instead of by indictment, that the proceedings are criminal.

The plaintiff was not a prisoner convicted of crime. There are none of the elements of a conviction of crime in the case of a proceeding under s. 32. There is nothing in the nature of a trial. There is no verdict of a jury or anything equivalent to it. There is no regular criminal charge formulated as in the case of an indictment found by a jury, or an information before justices. The evidence in such a case is on affidavit. Surely the Court would read an affidavit by the party proceeded against. If so, the proceeding cannot be of a criminal nature. The order is not a conviction, but a mere order made in the exercise of a summary jurisdiction to punish for contempt. The 35th and 36th sections of the Act now repealed and superseded by 23 & 24 Vict. c. 127, s. 26, tend to shew what was the scope of the 32nd section.

It is contended, secondly, that the true construction of 40 & 41 Vict. c. 21, s. 41, is that the words "for contempt of any Court," refer only to the immediately preceding word "attachment."

Sir R. E. Webster, A.G., was not called on to reply.

LORD ESHER, M.R. The question in this case is whether the defendant was justified in causing the plaintiff to be treated in the manner complained of by the warrant for the committal of the plaintiff. The warrant, in substance, states that he is to keep

(1) 8 Q. B. 883. (2) 8 Q. B. D. 187.
(3) E. B. & E. 91.

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James Osborne in prison in execution of an order of the Queen's Bench Division, whereby he was committed to prison for six months pursuant to the statute 6 & 7 Vict. c. 73, s. 32, for having acted or practised as a solicitor without being duly qualified. The question, therefore, is whether the proceeding under s. 32 with regard to an unqualified person acting as a solicitor, is a conviction of a crime or not. It is quite true that it is not a conviction after a trial by jury, but that is not the only mode of "conviction" known to the law. There are summary convictions by magistrates; and a person summarily convicted under statutes providing for such a conviction is undoubtedly convicted of a crime. The section, in substance, says that, "if any solicitor shall willfully and knowingly act as agent in any action or suit in any court for any person not duly qualified to act as a solicitor, or permit his name to be used in any such action or suit, or do any other act to enable any such unqualified person to appear, act, or practise in any respect as a solicitor, then, on complaint made in a summary way to any of the superior Courts wherein such attorney or solicitor has been admitted, and proof thereof on oath, every such solicitor so offending shall and may be struck off the roll, and in that case it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any time not exceeding one year. The question is whether the offence for which an unqualified person is punished under that section is a crime? Sect. 2 of the Act prohibits any person from doing the act for which the imprisonment may be awarded under s. 32. It is clear that any person disregarding that prohibition might be indicted for a misdemeanor. Sect. 32 would seem to give in addition a summary mode of dealing with the offence. But, if it be argued that s. 32 at the same time creates the offence and provides for its punishment, it seems to me impossible to suppose, when the legislature says that, if a person does a certain thing, he shall go to prison for a year, that it is not by necessary implication dealing with such an act as a crime. The offence in question has all the essential elements of a crime. The offender who comes within s. 32 is doing a thing which is in itself evil by an arrangement with another which partakes of the nature of a

conspiracy. That being so, it appears to me that any person dealt with by a Court under the latter part of the section is a person who has been convicted of a criminal offence.

It was urged that the case came within the 41st section of the Prison Act, 1877, which provides that any person, who shall be imprisoned under any rule, order, or attachment for contempt of any Court, shall be treated as a misdemeanant of the first division: and the learned judge in the Court below seems to have thought that to be so on the ground that the words "for contempt of any Court" only applied to the immediately preceding word "attachment." It seems to me that it would be a strange thing to enact that, wherever under a rule or order of a Court imprisonment is inflicted, then, quite irrespective of any view taken by such Court as to the character of the offence in the particular case, the offender shall necessarily be treated as a first-class misdemeanant. I cannot so read the section. I think the words "for contempt of any Court" apply to all that goes before; and, therefore, that this section does not apply to cases of persons imprisoned under an order of Court not for contempt but for a criminal offence. For these reasons I think this appeal must be allowed.

BOWEN, L.J. I agree. The question for us is whether the defendant was justified by the warrant in treating the plaintiff as a convicted criminal. The warrant stated that the plaintiff was committed to prison under s. 32 of 6 & 7 Vict. c. 73, for having acted as a solicitor without being duly qualified: and the question, therefore, is whether a person who has been committed to prison under that section is a convicted criminal. It seems to me clear that the proceeding under the section against a person who has acted as a solicitor without being qualified is a criminal proceeding. In the first place it is clear that the acts which he has committed are prohibited by the 2nd section of the Act. It must always be a question on the construction of the particular statute whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes certain consequences more or less unpleasant to the doing of the act. If the act is prohibited or rendered illegal in the former sense, it may be made the subject of an indictment for misdemeanor, or

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the statute may provide for summary proceedings either cumulatively or exclusively of the remedy by indictment. It appears to me that s. 2 forbids the acts which the plaintiff committed in the sense that it renders them criminal. That conclusion is largely aided by the consideration that they are not merely wrong as being against the provisions of a statute, but wrong in themselves, and such as, apart from the statute, might be expected to be treated as criminal. Then, again, it is to be observed that the scope of the 32nd section does not appear to be merely to treat the act in question as a contempt, but to give to any Court, in which the solicitor proceeded against together with the unqualified person has been admitted, the power of striking the one off the rolls and imprisoning the other. The power of inflicting the punishment is one given not only to a Court against which a contempt may have been committed by reason of the doing of the acts mentioned, but to any Court in which the solicitor has been admitted. Upon the terms of s. 32 I come to the conclusion that the act therein rendered punishable by imprisonment is a crime; and, if that be so, the person punished under the section is, in my opinion, a convicted criminal.

It is argued that s. 41 of the Prison Act, 1877, has entitled a person imprisoned under any rule or order of a Court to be treated as a first-class misdemeanant. In my opinion that section only applies to persons committed for contempt of Court.

FRY, L.J. I concur. The first question is whether the plaintiff was a prisoner convicted of a crime. The 6 & 7 Vict. c. 73, s. 2, prohibits an unqualified person from acting as a solicitor. The result is that any person so acting without being qualified is guilty of a misdemeanor. The 32nd section deals, as it seems to me, with a particular phase of such action, viz., where the unqualified person is associated in so acting with a solicitor. In such case it enables the Court on a complaint made in a summary way to deal with the solicitor by striking him off the rolls, and with the unqualified person by committing him to the prison of the Court. Pausing there it seems clear that the section is merely dealing with a particular form of the offence created by s. 2, and enacting that in that case summary proceedings may be

taken against the solicitor and unqualified person together. It was argued that there could not be a conviction without a trial, and that in the case of such a proceeding under s. 32 there could not be said to be a trial. The argument seems to be based upon some notion that there cannot be a trial except before a judge and jury, or a justice of the peace. But I cannot see why a power of summary trial and conviction should not in such a case be entrusted to judges of the superior Courts, who are magistrates of a higher grade than a justice of the peace; and it seems to me that such a power has been given by the section. Then reliance was placed upon the provisions of 23 & 24 Vict. c. 127, s. 26, which declares that the acting as a solicitor by an unqualified person shall be deemed to be a contempt. The inference which arises from that provision would rather seem to be that the jurisdiction given by the earlier provision of s. 32, was not to deal with the matter as a contempt. Moreover it is clear that the jurisdiction under s. 32 was given to any of the superior Courts in which the solicitor proceeded against with the unqualified person was admitted; so that apparently, if the solicitor was admitted in the Court of Chancery, the jurisdiction under the section might be exercised in that Court in respect of an acting in the Court of Queen's Bench and vice versâ. A provision intended to deal with an act as a contempt of Court would in the nature of things treat it as a contempt of the particular Court with relation to which the contempt was committed. For these reasons it does not seem to me that the proceeding under s. 32 is for contempt.

It was argued in the second place that s. 41 of the Prison Act, 1877, applied. The judge in the Court below seems to have thought that the section applied to any person imprisoned under any rule or order of Court, whether for contempt or otherwise. It would be a somewhat remarkable provision that in every case a person imprisoned under any rule or order, independently of the view of the judge or judges who made such rule or order, should be entitled to be treated as a first-class misdemeanant. But I do not think that is the true construction of the section. I think it applies only to imprisonment for contempt. The marginal note, though of course not binding as part of the enactment, seems to

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me in this case correctly to give the effect when it describes the section as relating to "treatment of persons committed for contempt of Court." For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *Godfrey.*

Solicitors for defendant: *Hare & Co.*, for Solicitors to the Treasury.

E. L.

Feb. 25.

PENNY *v.* HANSON.

Criminal Law—Rogue and Vagabond—Astrology—Professing to tell Fortunes—5 Geo. 4, c. 83, s. 4.

The appellant was convicted under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person pretending or professing to tell fortunes . . . to deceive and impose on any of His Majesty's subjects." He had published advertisements in various newspapers offering to cast nativities, give yearly advice and answer astrological questions. A detective wrote to him and received from him a circular setting forth the appellant's views of astrology as a science, and stating that by the positions of the planets in the nativity and their aspects to each other he was able to tell any applicant's fortune in the various events of life in return for certain remuneration. He never actually told anything to the detective, and there was no evidence to shew whether or not he believed in the truth of his professions:—

Held, that on this evidence the appellant was rightly convicted.

CASE stated by a metropolitan police magistrate under 42 & 43 Vict. c. 49, of which the following are the material parts:—

The respondent preferred an information against the appellant under s. 4 of 5 Geo. 4, c. 83, charging him with unlawfully pretending to tell fortunes to deceive and impose on one Khurt and others of Her Majesty's subjects, and the appellant was convicted and sentenced to pay a fine of 5*l.* and costs.

The appellant had caused to be inserted in various newspapers advertisements to the following effect:—"Neptune the astrologer's permanent address is 12, Grenville Street, London, W.C. Terms sent on application. Wanted, every one to have their own nativity cast. Yearly advice given and astrological questions answered. For terms send stamp to Neptune at above address." Khurt, a

detective, applied to the appellant in answer to the advertisement, and received a circular from him in which, after stating the respondent's views as to astrology as a science, the following passage occurred: "By the position of the planets in the nativity and their aspects to each other we are able to give the general descriptions of person, the diseases liable to, health, mental abilities and disposition, the occupation most suitable, where and when successful, marriage, travelling, friends, &c., and the events of every-day life. Interviews are unnecessary; all that is required is the time of birth as near as possible; day of week, day of month, year, sex, and birth-place." Then followed a scale of charges.

On the part of the appellant it was contended (*a*) that there was no evidence of any pretence or profession to tell the fortune of Khurt, inasmuch as there was nothing whatever told to him as being his fortune, and that by the Act such pretence or profession must consist of the actual telling or purporting to tell a fortune.

(*b.*) That the profession made by the appellant in his circular was that he could apply certain rules (which were known to those who had studied astrology) to the particular cases of individuals, and although this was coupled with an expression of opinion that such fixed rules were sound, and when properly applied would give an indication of what was likely to happen, yet there was no pretence by the appellant that he had any mysterious personal power of divination such as might impose on the credulity of the superstitious, which was the mischief aimed at by the Act.

(*c.*) That there was no evidence of intent to deceive as required by the words of the Act, as there was no evidence that the appellant had not the most implicit belief in the science he professed to apply.

The magistrate, being of opinion that there was evidence which convinced him that the appellant did pretend and profess to tell fortunes, and that he did it to deceive and impose on Khurt and others of His Majesty's subjects within the meaning of the said section, convicted the appellant.

The question for the Court was whether there was evidence sufficient to justify the conviction.

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Murphy, Q.C., and *Wormald*, for the appellant. There was no proof of acts of deceit in this case as in *Monck* v. *Hilton* (1), neither was there any evidence that the appellant did not believe in what he professed to do.

[DENMAN, J. The statute does not seem to require that in order to constitute the offence of professing to tell fortunes there should be any intention to deceive.]

The appellant told nothing whatever to Khurt.

Poland, for the respondent, was not called on.

DENMAN, J. In this case res ipsa loquitur. It is absurd to suggest that this man could have believed in his ability to predict the fortunes of another by knowing the hour and place of his birth and the aspect of the stars at such time. We do not live in times when any sane man believes in such a power. I think the magistrate was right, and that there was an intention to deceive on the part of the appellant in professing his ability to tell the fortune of Khurt. I do not think it necessary to decide whether the mere telling of fortunes is an offence within this statute; but, assuming the right construction of the words to be that professing to tell fortunes is an offence when done with an intent to deceive and impose, I am of opinion that there was ample evidence to justify this conviction.

MATHEW, J. I am entirely of the same opinion.

Conviction affirmed.

Solicitors for appellant: *William Webb & Templeton.*

Solicitors for respondent: *Solicitor to the Treasury.*

(1) 2 Ex. D. 268.

W. J. B.

[CROWN CASE RESERVED.]

1887
March 5.

THE QUEEN *v.* RILEY.

Criminal Law—Evidence—Attempt to commit Rape—Evidence of previous Connection between Prosecutrix and Prisoner, whether admissible.

On the trial of an indictment charging an assault with intent to rape if the prosecutrix, in answer to cross-examination, denies having voluntarily had connection with the prisoner prior to the alleged assault, evidence to contradict her by proving such prior connection is admissible on his behalf.

CASE reserved by justices at quarter sessions.

At the intermediate sessions, held at Manchester, in the county of Lancaster, for the hundred of Salford, on August 18, 1886, James Riley was tried upon an indictment charging him with an assault upon one Alice Creswell with intent to commit a rape upon her. There were two other counts in the indictment—one charging an indecent assault, the other a common assault.

The defence raised by the prisoner's counsel was that whatever was done by the prisoner to the said Alice Creswell was done with her consent. Alice Creswell was at the time of the commission of the alleged offence by the prisoner a woman of or about thirty years of age.

She was cross-examined by the counsel for the prisoner as to previous repeated voluntary acts of connection with the prisoner at specified times and places before the time of the commission of the alleged offence, which she denied, and swore that she never at any time or place had had connection with the prisoner.

Counsel for the defence proposed to call several witnesses to prove these several alleged acts of connection between the prosecutrix and the prisoner, but the Court refused to allow those said witnesses to be called or examined for the purpose of giving such evidence, upon the ground that such evidence was not admissible for the prisoner upon the indictment, and that the counsel for the prisoner was bound to take the answer of the prosecutrix for the purposes of that trial; but the Court reserved for the opinion of this honourable Court the question as to whether it was right in so ruling.

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The prisoner was convicted on the first count of the indictment, but the Court respited judgment and admitted him to bail pending the decision of this honourable Court.

If the Court should be of opinion that the court of quarter sessions was right in rejecting the evidence the conviction is to stand, otherwise to be quashed.

Addison, Q.C., for the prisoner. The conviction should be quashed. The evidence which the chairman at quarter sessions rejected was not evidence in any collateral matter, but went directly to the issue. Evidence of the relation which has existed between the woman and the man prior to the alleged criminal attempt is admissible as affecting her credibility on a matter directly pertinent to the issue. The rule that evidence to contradict the woman's statement that she had not previously had connection with other men is inadmissible, as the cases shew, on the grounds that such evidence is not pertinent to the issue whether the act done by the particular man charged was done against her will, and that to admit such evidence would open too large a field for inquiry into allegations in respect of collateral matters which she was not prepared to meet. The result of the authorities upon the question in this case is correctly stated in Stephen's Digest of the Law of Evidence, 4th ed., art. 134, p. 136, namely, that the woman may be asked whether she has had connection on other occasions with the prisoner, "and if she denies it she [probably] may be contradicted." The general principle is stated by Lawrence, J., in *Harris* v. *Tippett* (1): questions may be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit, but when these questions are irrelevant to the issue on the record, other witnesses cannot be called to contradict the answers he gives. In a note to *Rex* v. *Martin* (2), Hullock, B., in *Rex* v. *Aspinall* (3), is said to have held "that, on the trial

(1) 2 Camp. at p. 638.

(2) 6 C. & P. 562.

(3) In the note to *R.* v. *Martin* the reference to *R.* v. *Aspinall* is wrong. "*R.* v. *Aspinall*, Cor. Hullock, B., York Spring Assizes, 1827," is cited in Stark. on Ev. 3rd ed. (1842), vol. iii. p. 952, in support of the proposition that "on an indictment for a rape the prisoner may shew that the prosecutrix has been previously criminally connected with himself."

of an indictment for a rape, the prisoner might shew that the prosecutrix had been previously criminally connected with him." In *Reg.* v. *Cockroft* (1), tried at Assizes before Willes, J., the learned judge refused to allow the prisoner's counsel, on an indictment for rape, to call witnesses to prove particular acts of connection with the prosecutrix by other men; but the learned judge added, "You may, however, examine her with respect to particular acts of connection with the prisoner, and if she denies them you may call witnesses to contradict her." In *Reg.* v. *Holmes* (2) (where the indictment was for an indecent assault, and the Court for Crown Cases Reserved held that the prosecutrix could not be contradicted as to her answer, on cross-examination, that she had not previously had connection with a man other than the prisoner) Kelly, C.B., said that evidence of the prosecutrix having previously had connection with the prisoner "is undoubtedly admissible, for it has a direct bearing upon the question of consent."

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J. I am of opinion that this conviction must be quashed, on the ground that evidence material to the issue was rejected at the trial. The indictment charged the prisoner with having assaulted the prosecutrix with intent to commit a rape upon her; and the question having been put to her in cross-examination whether she had on former occasions had connection with the prisoner, and she having denied that she had, it was proposed on behalf of the prisoner to call witnesses to shew that she had had connection with him on various occasions before the commission of the alleged offence. I think it is clear that the evidence of those witnesses should have been received. It has been held that evidence to shew that the woman has previously had connection with persons other than the accused, when she has denied that fact, must be rejected, and there are very good reasons for rejecting it. It should in my view be rejected, not only upon the ground that to admit it would be unfair and a hardship to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the

(1) 11 Cox, C. C. 410. (2) Law Rep. 1 C. C. 334.

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trial. The question in issue being whether or not a criminal attempt has been made upon her by A., evidence that she has previously had connection with B. and C. is obviously not in point. It is obvious, too, that the result of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of this nature. But to reject evidence of her having had connection with the particular person charged with the offence is a wholly different matter, because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment. This line of examination is one which leads directly to the point in issue. Take the case of a woman who has lived, without marriage, for years with the accused before the alleged assault was committed. Can it be reasonably contended that the proof of that fact, or evidence tending to prove that fact, is not material to the issue, and if material to the issue that such evidence should not be admitted? As to authority, Hullock, B., in a case the report of which I have not been able to find (1), seems to have decided the very point, because on an indictment for rape he is said to have held that the prisoner was entitled to shew that the woman had had connection with him before. It is sufficient for this Court to say that that decision appears to have been founded on good sense. Upon principle and upon authority, therefore, I am of opinion that the evidence in this case ought to have been received, and that the conviction must be quashed.

POLLOCK, B. I agree. The only question we have to consider is whether the evidence rejected was or was not material to the issue. It is clear that evidence of the woman having had connection with other men would not be relevant, but where the only question is whether she consented to what was done by the prisoner, I am clearly of opinion that evidence of her having previously allowed him to have connection with her is relevant to the issue. One can understand that until the passing of the Criminal Law Amendment Act, by which the prisoner was enabled himself to give evidence, it could hardly be expected that witnesses would come forward to prove such previous connection,

(1) See note (3), ante, p. 482.

and that may account for the absence of direct authority upon this point.

STEPHEN, J. I am of the same opinion. There is some authority to shew that the law was in the condition in which the decision of this Court in the present case places it, but I thought the matter could not be said to be without doubt. The doubt is now removed by this decision. I will only add that I feel sure that nothing which has been said as to the inadmissibility of evidence of the prosecutrix having had connection with other men is intended to conflict with the right of the prisoner, on an indictment for rape or attempt to ravish, to give evidence that the woman was a common prostitute.

MATHEW, J. I am of the same opinion. I am glad to find that we are not coerced by any decision in conflict with our view, which is, I think, in accordance with justice and common sense.

WILLS, J. I am of the same opinion.

Conviction quashed.

Solicitor for the prisoner: *S. F. Butcher, Bury.*

W. A.

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March 10.

BUCHANAN and Another, Appellants *v.* HARDY, Respondent.

Criminal Law—Lunatic—Ill-treatment of, by Parent—Liability of Parent to Conviction—Person having "the care or charge" of Lunatic—16 & 17 *Vict. c.* 96, *s.* 9.

The parents of a lunatic who resides with them under their care are persons "having the care or charge" of a lunatic within the meaning of 16 & 17 Vict. c. 96, s. 9, and may be convicted under that section for ill-treating such lunatic.

Reg. v. *Rundle* (1 Dear. & Pearce, 482) questioned.

Case stated by justices, the facts of which were in substance as follows:—

An information was preferred by the respondent on behalf of the Commissioners in Lunacy against the appellants under 16 & 17 Vict. c. 96, s. 9, for that they being persons taking and having the care and charge of Annie Letitia Buchanan, a lunatic, did ill-treat her.

It was proved that Annie Letitia Buchanan was an unmarried woman of about thirty-one years of age, residing with appellants, who were her parents; that she was a lunatic, and that she was ill-treated by the appellants. The justices convicted the appellants. The question for the Court was whether the appellants, being the parents of the lunatic, could be convicted under 16 & 17 Vict. c. 96, s. 9.

Jelf, Q.C., and *Stubbins*, for the appellants. A parent is not a person having the care or charge or custody of a lunatic child within the meaning of 16 & 17 Vict. c. 96, s. 9 (1), for that statute does not apply to a care and charge which is purely of a domestic nature: *Reg.* v. *Rundle.* (2) The statute does not apply to any case in which the law lays a duty on one person to maintain another. In *Reg.* v. *Porter* (3) the distinction between the case

(1) 16 & 17 Vict. c. 96, s. 9: "If any person detaining or taking or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanour."

(2) 1 Dear. & Pearce, 482.

(3) Leigh & Cave, C. C. R. 394.

of one who voluntarily undertakes the charge of a lunatic and the case of one who is by law compelled to maintain the lunatic, is pointed out. Where, therefore, a brother voluntarily takes charge of a lunatic brother, the statute applies, for there is no legal obligation on a brother to maintain his brother: *Reg.* v. *F. Smith* (1) and *Rex* v. *Smith.* (2) This reason does not apply to the case of parent and child, for by 43 Eliz. c. 2, parents are bound to maintain their children, so that the principle laid down in *Reg.* v. *Rundle* (3) applies, and the conviction ought to be quashed.

Channell, Q.C., and *J. H. E. Smith*, for the respondent, were not called on.

LORD COLERIDGE, C.J.:—

I am of opinion that this conviction must be affirmed. The justices having found that the appellants did ill-treat the lunatic, who was their daughter and under their care, it has been argued that, notwithstanding those findings, the persons charged with ill-treating this lunatic are not liable under 16 & 17 Vict. c. 96, s. 9, because they are the parents of the lunatic. That section enacts that if "any person detaining or taking or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanour."

The question, therefore, is raised whether the words which I have cited include the case of a father and mother having the charge of a child who is a lunatic. Now primâ facie they are persons who come within the provisions of the section, and it would seem that the Act expressly provides that if any person having the charge (and parents have the charge of their children) of a lunatic, ill-treat that lunatic, he shall be guilty of a misdemeanor.

But in *Reg.* v. *Rundle* (3) the Court of Criminal Appeal decided that a husband who ill-treated a lunatic wife did not come within the purview of 16 & 17 Vict. c. 96, s. 9, and the judges based their decision on the ground "that the legislature never intended to

(1) 14 Cox, C. C. 398.
(2) 2 C. & P. 449.
(3) 1 Dear. & Pearce, 482.

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interfere with a care and charge which is purely of a domestic nature and arises from the relation of husband and wife or other similar relation," as was said by Pollock, C.B.; while Parke, B. said: "The latter words of s. 9 do not apply to persons who, having a natural duty to perform, have, as father, husband, or otherwise, merely the domestic custody of a lunatic."

The grounds on which that decision was based have not been accepted without dissent in later cases, and I am of opinion that the case of *Reg.* v. *Rundle* (1), if it is an authority at all, can only be held to be a binding authority in the case of a husband and wife. The reasons contained in the judgments were not adopted by the Court of Criminal Appeal in *Reg.* v. *Porter* (2) to the judgment in which Pollock, C.B., was also a party, for it was there held that a man who takes care of a lunatic brother is a person having the care and charge of a lunatic within the meaning of this section. No case has been cited in which the relationship of parent and child has come before the Courts for consideration with reference to this statute, and although Parke, B., mentioned the case of a father in *Reg.* v. *Rundle* (1), still it is clear that the general principle there suggested of domestic custody was expressly departed from in *Reg.* v. *Porter*. (2) I cannot say that the reasons given in *Reg.* v. *Rundle* (1) are satisfactory to my mind, nor do I think that Pollock, C.B., was satisfied with them when he had occasion to reconsider them in *Reg.* v. *Porter*. (2) The principle which must be adopted is that if any person has the care or charge or custody of a lunatic, and in the course of that custody he in any way abuses, ill-treats, or wilfully neglects that lunatic, then, whether the custody be or be not what has been called domestic custody, the person so ill-treating, &c., the lunatic, comes within 16 & 17 Vict. c. 96, s. 9, and is liable to the provisions of that section.

MATHEW, J. I am of the same opinion. The decision of *Reg.* v. *Rundle* (1) has been minimised by the decision in *Reg.* v. *Porter* (2), and has in fact been reduced to this, that in *Reg.* v. *Rundle* (1) the Court held that in the circumstances of that case the husband had not the care, charge, or custody of his wife within the meaning of 16 & 17 Vict. c. 96, s. 9. In the present

(1) 1 Dear. & Pearce, 482. (2) Leigh & Cave, C. C. R. 394.

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case the justices have found that the parent had the care of his child, and the enactment under which he was charged is satisfied.

CAVE and A. L. SMITH, JJ., concurred.

Conviction affirmed.

Solicitor for appellants: *Fuller.*

Solicitors for respondent: *Vandercom & Co.*

R. B. R.

[IN THE COURT OF APPEAL.]

Jan. 26.

IN RE CLEAVER. EX PARTE RAWLINGS.

Bill of Sale—Equal Payments of Principal—Terms for the Maintenance or Defeasance of the Security—Covenant for further Assurance—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule.*

The form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, is, in respect of the covenant by the grantor to pay the principal sum secured "by equal payments" at specified times, directory and not obligatory; so that a covenant to pay the principal sum by unequal payments at the specified times does not render a bill of sale void.

A covenant that the grantor, and all persons claiming through or under him, will at all times at his cost execute and do all such assurances and things for the further and better assuring all or any of the chattels assigned to the grantee, and enabling him to obtain possession of the same, as may by him be lawfully required, is a provision "for the maintenance of the security," the insertion of which in a bill of sale is permitted by the Act of 1882.

The power to sell the chattels assigned by a bill of sale carries with it implied trusts with respect to the moneys produced by the sale. Where the bill of sale contained an express declaration that the grantee should retain out of the sale moneys the principal sum, or so much thereof as might for the time being remain unpaid, and the interest then due, together with all costs, charges, payments, and expenses incurred or sustained in and about entering the grantor's premises and in discharging any distress, execution, or other incumbrance on the chattels assigned, and seizing, taking, retaining, and keeping possession thereof, and in and about the carriage, removal, warehousing, valuing, or sale thereof (including the cost of inventories, catalogues, or advertising):—

Held, that the trusts declared of the sale moneys were such as might reasonably and properly be inserted, and did not differ from the trusts that would have been implied if there had been no such express declaration.

Decision of Cave, J., affirmed.

APPEAL from the decision of Cave, J., dismissing a motion, made on behalf of the trustee in bankruptcy of the estate of

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one Cleaver, that a bill of sale given by the bankrupt in favour of the Consolidated Credit and Mortgage Company, Limited, should be declared void.

By the bill of sale, made on November 30, 1885, the mortgagor, in consideration of 70*l.* paid to him by the mortgagees, assigned to them all the chattels and things then being in and about the mortgagor's dwelling-house, and specifically described in the schedule to the bill, by way of security for the payment of the same sum of 70*l.* and interest thereon at 60 per cent. per annum. The covenant for payment was as follows:—"And the said mortgagor doth further agree and declare that he will duly pay to the said mortgagees the principal sum aforesaid by the following instalments, namely, the sum of six pounds on the last day of December next, and the like sum on the last day of every succeeding month until the last day of October next, and the balance of the said principal sum then remaining due with interest at the rate aforesaid on the last day of November next, and will also so long as the principal sum aforesaid or any part thereof shall remain unpaid at the time hereinbefore appointed for payment of the instalments of the said principal sum pay interest after the rate aforesaid upon the said debt or upon so much as shall for the time being remain unpaid."

The bill of sale also contained the following covenants and provisions:—"And that the said mortgagor, and every other person or persons claiming by or through the said mortgagor any interest in the said chattels and things, or any of them, will at all times at the costs of the mortgagor execute and do all such assurances and things for the further and better assuring all or any of the said chattels and things unto the mortgagees, and enabling them to obtain possession of the same as may by them be lawfully required: And it is hereby agreed and declared that in case the said mortgagor shall make default in payment of the principal sum aforesaid or of any part thereof, or of the interest thereon at the times hereinbefore appointed for the payment, or in the performance of any covenant or agreement contained herein and necessary for maintaining the security, or if he shall become a bankrupt, or suffer the said chattels or things or any of them to be distrained for rent, rates, or taxes, or if he shall fraudu-

lently either remove or suffer the said things or any of them to be removed from the premises in which the same are or shall be, or if he shall not without reasonable excuse upon demand in writing by the said mortgagees produce to them the last receipt of the said mortgagor for rent, rates, and taxes, or if execution shall have been levied against the goods of the said mortgagor under any judgment at law, it shall be lawful for the mortgagees, their servants or agents, to enter into or upon the premises in which the said chattels and things, or any of them, are or shall be to seize or take possession of the whole or any part thereof, and after the expiration of five clear days from the day of seizing or taking possession to remove, sell, and dispose of the same or any part thereof for such price or prices as can reasonably be obtained, and either by public auction or private contract, and out of the sale moneys to retain the principal sum aforesaid or so much thereof as may for the time being remain unpaid and the interest then due together with all costs, charges, payments, and expenses incurred, made, or sustained in and about entering upon the said premises, and in discharging any distress, execution, or other incumbrance on the said chattels or things or any of them, and seizing, taking, retaining, and keeping possession of the said chattels and things or any part thereof, and in and about the carriage, removal, warehousing, valuing, or sale (including the cost of inventories, catalogues, or advertising) of the said chattels and things or any part thereof, and to pay over the surplus, if any, to the mortgagor. And it is hereby agreed and declared that this assignment shall be void if the principal sum aforesaid together with the interest thereon shall be paid to the mortgagees as herein provided."

A receiving order was made against Cleaver on May 4, 1886, and the appellant was duly appointed trustee of the estate on June 7, 1886.

The trustee appealed from the decision of Cave, J.

Aug. 11, 1886. *Cooper Willis, Q.C.* (*Lee Roberts,* with him), for the appellant.

Sir H. Davey, Q.C. (*Clay,* and *C. C. Scott,* with him), for the respondents.

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The arguments are sufficiently stated in the judgment.

The following cases were cited:—*Davis* v. *Burton* (1); *Cook* v. *Fowler* (2); *Ex parte Popplewell, In re Storey* (3); *Ex parte Stanford, In re Barber* (4); *Consolidated Credit Co.* v. *Gosney*. (5)

Cur. adv. vult.

Jan. 26, 1887. The judgment of the Court (Lord Esher, M.R., Bowen and Fry, L.JJ.) was delivered by

FRY, L.J. The question in this case turns on the validity of a bill of sale dated November 30, 1885, and made between the bankrupt, Cleaver, of the one part, and the Consolidated Credit and Mortgage Company, Limited, of the other part, by which certain chattels were assigned to the mortgagees to secure a sum of 70*l.* and interest at the rate of 60 per cent. per annum. By it the mortgagor agreed to pay the principal sum by the following instalments, namely, 6*l.* on the last day of December, 1885, and the like sum on the last day of every succeeding month until the last day of October, 1886, and the balance of the principal sum then remaining due, with interest at the rate aforesaid, on the last day of November, 1886. It was contended that this agreemeent was not in accordance with the statutory form, as the principal was to be repaid by unequal instalments, inasmuch as the last payment, namely, that in November, 1886, would be not 6*l.* but 10*l.* But we are of opinion that the liberty given by the statutory form to insert stipulated times or time of payment other than those suggested by the form excludes the necessity of the payments being by equal instalments. There is liberty to insert one single time for repayment, and if only one time of payment be fixed, and one payment only be made, the repayment cannot be said to be by equal instalments. The provision for equality of the instalments is, therefore, not obligatory, but subject to variation.

The covenant last stated is followed by another, also on the part of the mortgagor, to this effect:—He covenants that he will, so long as the principal sum of 70*l.* or any part thereof shall

(1) 11 Q. B. D. 537.
(2) Law Rep. 7 H. L. 27.
(3) 21 Ch. D. 73.
(4) 17 Q. B. D. 259.
(5) 16 Q. B. D. 24.

remain unpaid at the time thereinbefore appointed for payment of the instalments of the said principal sum, pay interest after the rate aforesaid upon the said debt, or upon so much as shall for the time being remain unpaid. It was contended before us that the object and effect of this covenant was the payment of interest, not only on any overdue instalment of principal, but interest on any overdue sum of interest. But it appears to us that this is not the true construction of the clause. We think that the words "said debt" refer only to the debt mentioned in immediate antecedence, namely, "the principal sum of 70*l.* or any part thereof," and consequently describe principal only: and it is to be observed that the contingency on which the covenant is made to operate is only in the event of delay in payment of the principal sum or some part thereof, and that the covenant, therefore, does not operate where there is delay or default in payment only of interest.

In the next place it was contended that the covenant for further assurance at the cost of the mortgagor was in excess of the statutory form. But in our opinion such a covenant is one for the maintenance of the security, and is consequently free from objection.

The bill of sale in question further goes on to provide that the chattels may be seized and sold in certain events which correspond with those enumerated in s. 7 of the Act of 1882, and declares that the mortgagor may out of the sale moneys retain, not only all principal and interest, but also all costs, charges, payments, and expenses incurred, made, or sustained in and about entering upon the premises, and in discharging any distress, execution, or other incumbrance on the chattels, and seizing, taking, retaining, and keeping possession of the chattels, and in and about the carriage, removal, warehousing, valuing, or sale (including the cost of inventories, catalogues, and advertising) of the chattels.

According to the recent decision of the majority of this Court in *Ex parte Official Receiver, In re Morritt* (1), a power of sale arose on the exercise of the power to seize. This power of sale must carry with it implied trusts of the sale moneys; and the

(1) Ante, p. 222.

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question therefore is whether the express declaration in the present case does, or does not, conform to and agree with the implied trusts. The trusts expressly declared in the present case appear to us reasonable and proper ones under the circumstances, and we therefore think that they do not differ from such trusts as would have been implied.

For these reasons we are of opinion that the bill of sale in question is free from objection, and consequently that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Andrew Timbrell & Co.*.
Solicitor for the respondent: *P. E. Vanderpump.*

W. A.

Feb. 3, 4; *March* 8.

[IN THE COURT OF APPEAL.]

FURBER *v.* COBB.

Bill of Sale—Validity—Covenant "necessary for maintenance of security"—Power to seize—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Form in Schedule.*

A bill of sale, given as security for money, assigned to the grantees, who were auctioneers, the chattels specifically described in a schedule, and which were stated to be then in a certain house. The grantor covenanted (inter alia) that he would not remove the chattels from the premises where they then were, without the previous consent in writing of the grantees; that he would not permit the chattels, or any part thereof, to be destroyed or injured, or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear thereof, and would, whenever any of the chattels were destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same; and that he would, on demand in writing, produce to the grantees his last receipt or receipts for the rents, rates, and taxes in respect of the premises where the chattels then were. And it was agreed that, in case default should be made by the grantor (inter alia) in the performance of any of the covenants thereinbefore contained on his part, all of which covenants were thereby declared and agreed to be necessary for the maintenance of the security thereby created, it should be lawful for the grantees after any such default without notice, immediately or whenever they should think fit, to seize and take possession of the chattels, and, after the expiration of five clear days, to sell the same, and out of the proceeds of sale in the first place to reimburse themselves the costs, charges, and expenses of and attending such sale, including therein the full charges and commission of the grantees as auctioneers, as if they were selling on behalf of the grantor. At the end of the deed was a proviso that the chattels should

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not be liable to seizure or to be taken possession of by the grantees for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882 :—

Held, reversing the decision of Bowen, L.J. (1), that the covenant to replace and repair articles destroyed, injured, or deteriorated, was "necessary for maintaining the security," and that the bill of sale was not void because power was given to seize on a breach of that covenant.

But *held*, that the bill of sale was void because it authorized the grantees to retain their commission as auctioneers out of the proceeds of the sale of the chattels, this being a provision not for the maintenance of the security, but for obtaining for the grantees, in addition to the security, their trade profits as auctioneers by the sale, an advantage which they would not have had if the statutory form had been followed.

Held (by Sir James Hannen), that the covenant not to remove the chattels without the consent of the grantees, was necessary for maintaining the security; and *semble*, that the unqualified covenant to produce the receipts for rent, rates, and taxes on demand was also necessary.

The expression "necessary for maintaining the security" means, not the maintenance of a sufficient security less than that agreed to be given, but the maintenance of the security created by the bill of sale, and the security is maintained only when the subject-matter of the charge, and the grantee's title to it, are preserved in as good plight and condition as at the date of the bill of sale.

If a stipulation is not necessary for the maintenance of the security, it cannot be made so by the agreement of the parties.

Semble, that if a bill of sale contains a power to seize in an event not authorized by the Act, the insertion of a proviso that the goods shall not be liable to seizure for any cause other than those specified in s. 7 of the Act, will not render the deed valid.

APPEAL from the judgment of Bowen, L.J. (1), at the trial, without a jury, of an interpleader issue directed to determine the validity of a bill of sale given as security for money.

By the bill of sale, dated March 11, 1885, the grantor, Robert Webb, assigned to the grantees (who were auctioneers) the chattels and things specifically described in the schedule thereto annexed (and which were stated to be then in and about a certain messuage and premises of the grantor), by way of security for the payment of 600*l.* and interest thereon at the rate of 15 per cent. per annum. The deed contained (inter alia) the following provisions:—"And the mortgagor doth also agree with the mortgagees that he will not permit or suffer any writ of fieri facias, or other writ of execution, distress for rent, rates, or taxes to be levied or taken against or distrained upon the said chattels and things, or

(1) 17 Q. B. D. 459.

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any of them, nor become bankrupt; and that he will not remove the said chattels and things, or any of them, from the premises where they now are or (with the mortgagees' consent) may hereafter be removed to, without the consent in writing of the mortgagees, or one of them, first had and obtained; and will not permit or suffer the said chattels and things, or any part thereof, to be destroyed or injured, or to deteriorate, subsequently to the execution of these presents, in a greater degree than they would deteriorate by reasonable use and wear thereof, and will, whenever any of the said chattels and things are destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same; and will from time to time pay all rents, rates, taxes, and interest on mortgages payable in respect of the messuage and premises where the said chattels and things now are or may be removed to with such consent as aforesaid, and will, on demand in writing, produce and shew to the mortgagees, or one of them, his last receipt or receipts for the rents, rates, and taxes, in respect of the premises where the said chattels and things then are," and that he would insure the chattels for 500*l.* in the joint names of the mortgagor and the mortgagees, and would produce the receipt for the premiums to the mortgagees on demand in writing. And it was further agreed and declared "that in case default shall be made by the mortgagor in payment of the principal or interest, or any part thereof, contrary to the covenant for payment thereof hereinbefore contained, or in the performance of any of the covenants hereinbefore contained on the part of the mortgagor, all of which covenants are hereby declared and agreed to be necessary for the maintenance of the security hereby created, or if he shall become a bankrupt, or suffer the said chattels and things, or any of them, to be distrained for rent, rates, or taxes, or if the said chattels and things mentioned in the schedule, or any of them, shall be fraudulently removed, or suffered to be removed, from the premises on which the same are or shall be, or if the mortgagor shall not without reasonable excuse upon demand in writing by the mortgagees produce to them his said last receipts for rents, rates, and taxes, or if execution shall have been levied against the chattels and things of the mortgagor under any judgment at law,

in any of such cases it shall be lawful for the mortgagees, after any such default without notice, immediately or whenever they shall think fit, to seize and take possession of the said chattels and things, and every or any part thereof, in or at the hereinbefore mentioned premises where the said chattels and things now are, or where they may (with the consent of the mortgagees as aforesaid) have been removed to, and after the expiration of five clear days from such seizure and taking possession, to sell and dispose of, or to remove the same and sell the same wheresoever they shall think proper, either by private contract or by public auction, and to receive and take the moneys to arise from such sale or sales thereof, and therewith, in the first place, to reimburse and pay themselves the costs, charges, and expenses of and attending such sale, including therein the full charges and commission of the mortgagees as auctioneers, as if they were selling on behalf of the mortgagor, and, in the next place, repay and satisfy all costs, charges, and expenses that may be, or may have been, incurred during the continuance of this security by the mortgagees in and about defending, supporting, and upholding their claim and mortgage on the said chattels and things, or incident thereto, and giving effect to these presents according to the true intent and meaning thereof, or in payment of rents or other lawful preferential claims upon the said chattels and things, and also all and every other costs, charges, and sums of money which they may have been put to, or may have expended or incurred, in and about the receipt and recovery of the said sum of 600*l.* and interest, and to pay, satisfy, and discharge the said principal sum of 600*l.*, or so much thereof as shall then remain due and owing, and interest thereon after the rate of 15 per cent. per annum, from the date of these presents to the date of the full satisfaction and discharge of the same, and from and after the full payment of the said sum of 600*l.* and interest, and such commission, costs, charges, damages, and expenses, rents, rates, taxes, and incumbrances as aforesaid, to render to and account for the surplus, if any, of the moneys arising from such sale unto the mortgagor." There were covenants for title by the grantor, and the deed concluded with the following proviso :—"Provided always, that the chattels and things hereby assigned shall not be liable to seizure

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or to be taken possession of by the said mortgagees for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

Bowen, L.J., held that the bill of sale was void under the Act of 1882, on the ground that the covenant to replace and repair articles destroyed, injured, or deteriorated was not "necessary for maintaining the security," and that power was given to seize the assigned chattels on a breach of that covenant.

The grantees appealed.

Feb. 3, 4. *Pollard*, *R. Vaughan Williams*, and *E. F. Hodge*, for the appellants. If the covenant to replace and repair articles destroyed, injured, and deteriorated is not "necessary for maintaining the security," still it is a covenant "for the maintenance of the security," and the form in the schedule authorizes the insertion of terms "which the parties may agree to for the maintenance or defeasance of the security." The Act did not intend that the form given in the schedule should be exactly followed. Indeed, this is shewn by s. 7, which contemplates that the goods may be seized and sold, though the scheduled form contains no power to seize or to sell. *Ex parte Official Receiver, In re Morritt* (1), shews that a power to seize may be inserted. The form authorizes the parties to agree in each particular case what terms shall be necessary for maintaining the security. The proviso at the end of the deed prevents the seizure of the goods for any cause other than those specified in s. 7 of the Act, and the express power to seize and sell previously given does not extend to all breaches of the prior covenants. But the covenant to replace and repair, &c., is "necessary for maintaining the security." The Act by s. 4 requires that the chattels comprised in the bill of sale shall be specified in a schedule thereto, and "the security" is the scheduled articles. A covenant that the grantee will replace and repair any of those articles which may be destroyed, injured, or deteriorated is necessary for maintaining that security. Indeed, such a covenant has no greater effect than a covenant in express terms that the grantor will "maintain the security." The "maintenance of the security" is the maintenance of the things

(1) Ante, 222.

which form the security; it is not the maintaining the goods up to a value which represents the sum advanced. If the grantees should seize for a trivial breach of this covenant, then, under the proviso at the end of s. 7, the grantor could apply to a judge within five days after the seizure, and the judge would have power to restrain the grantees from removing or selling the chattels, if the default was capable of being made good "by payment of money or otherwise." This would include the replacing or repairing of any chattel which had been destroyed, injured, or deteriorated. *Consolidated Credit Corporation* v. *Gosney* (1), is in favour of the validity of the bill of sale, and that was approved by Lord Coleridge, C.J., in *Blaiberg* v. *Parsons*. (2) *Ex parte Stanford* (3) and *Davis* v. *Burton* (4) do not govern this case. *Davis* v. *Burton* (4) was only a decision that, if a proviso repugnant to the Act is inserted in a bill of sale, the bill of sale cannot be made good by the proviso at the end which occurs in the present bill of sale. But still, in construing the bill of sale, that proviso must be taken into account.

Lumley Smith, Q.C., and *Herbert Reed*, for the execution creditor. The bill of sale is void under s. 9 of the Act. The object of the Act was to protect borrowers against lenders of money, and to compel simplicity of form in bills of sale. The true test of the validity of a bill of sale is this—it must have the same legal effect as, neither more nor less than, the statutory form, and it must not be calculated reasonably to deceive the grantor or his creditors: *Ex parte Stanford*. (3) Tried by that test, this bill of sale is clearly void. It is an attempt to produce a much greater legal effect than if the deed had contained a covenant not to do the things mentioned in s. 7 as grounds for seizure. For instance, in the covenant not to remove the goods the word "fraudulently," which occurs in s. 7, is omitted. The covenant would be broken if the grantor changed his residence and moved the furniture into his new residence, or if he moved the articles out of the house because it was on fire. This covenant is not "necessary for maintaining the security."

The covenant not to permit the goods to be destroyed, injured,

(1) 16 Q. B. D. 24.
(2) 17 Q. B. D. 336, 337.
(3) 17 Q. B. D. 259.
(4) 11 Q. B. D. 537.

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or deteriorated, and to replace and repair, is not necessary for maintaining the security. It would apply to fair wear and tear in the ordinary use of the furniture, and the grantor would have the right to seize if a single cup or saucer was accidentally broken. Nor is the covenant to pay the interest on mortgages of the premises where the goods may be necessary for the safe custody of the goods. It might make the grantor liable for the interest upon a mortgage created by a superior landlord. No ordinary person looking at the deed would guess the extent of the liability imposed on the grantor, and thus the deed would be obscure or misleading.

Again, the covenant to produce the last receipts for rents, rates, and taxes is "on demand in writing," without any qualification, the words "without reasonable excuse," which occur in s. 7, being omitted. All the covenants which are impliedly recognised by s. 7 are intensified.

The power to seize for breach of covenants which are expressly declared to be "necessary for the maintenance of the security" cannot be cut down by the subsequent proviso: *Davis* v. *Burton* (1); *Ex parte Pearce.* (2)

Again, the provision that the grantees may retain out of the proceeds of sale their commission as auctioneers makes the bill of sale void. It enables them to make a trade profit out of the sale, and is clearly not necessary for maintaining the security.

"Maintaining the security" means maintaining the grantee's title to the goods, not maintaining the goods themselves: *Blaiberg* v. *Beckett.* (3) If one of the articles assigned was a picture by an eminent artist, could there be a covenant to replace it, in case it should be destroyed, by a picture of equal value by another artist?

That an invalid stipulation cannot be cured by the final proviso is shewn by previous decisions. The deed either does or does not give power to seize the goods on a breach of any of the covenants; if it does not, it is misleading; if it does, it must be shewn that the covenants are *necessary* for the maintenance of the security, not merely that they are covenants agreed to by

(1) 11 Q. B. D. 537. (2) 25 Ch. D. 656.

(3) Ante, 96, 103.

the parties for maintaining it. The parties cannot by agreement introduce stipulations which conflict with the provisions of the statute, nor can they by agreement make necessary for the maintenance of the security any stipulations which are not in fact necessary for that purpose.

Pollard, in reply. A covenant not to remove the goods may be necessary for the maintainance of the security, even though it is not limited to a fraudulent removal. There is an implied obligation on the part of the grantees to consent to a removal in any case of reasonable necessity. *Consolidated Credit Corporation* v. *Gosney* (1), shews that a stipulation for retaining auctioneer's charges and commission out of the proceeds of sale is valid. If other auctioneers had been employed, their charges and commission could have been retained, and it can make no difference if the grantees conduct the sale themselves. As to the interest on mortgages, the owner of a freehold house might have to pay that, though he would have no rent to pay.

Lumley Smith, Q.C., referred to *Matthison* v. *Clarke* (2), in which it was held by Kindersley, V.-C., that where a mortgagee, who was a member of a firm of auctioneers, sold under his power of sale, and his firm conducted the sale for him, he was not entitled to his commission.

Cur. adv. vult.

March 8. LORD ESHER, M.R. After hearing the arguments on this appeal I had come to the conclusion that the bill of sale was invalid, but I very much desired that the case should stand over for judgment, in order that the opinion of my Brother Hannen might be expressed in writing. My own judgment will be extremely short. I consider this bill of sale to be one of those perverse departures from the form given in the schedule to the Act with which we have so often to deal. This bill of sale consists of two long sets of clauses, which by one side are said to be identical, and by the other side are said to be different.

If they are identical, what could be the object of inserting both? If they are different, they must have, one would think, a different operation. One of these two sets of clauses follows

(1) 16 Q. B. D. 24. (2) 3 Drew. 3.

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almost exactly the terms of s. 7 of the Act; the other omits certain words which are said to be words of limitation. So far as I can see they do in many respects alter the legal effect of the statutory form of bill of sale, and, if they do, there cannot be the slightest doubt that the bill of sale is void. But, even if they do not alter the legal effect of the scheduled form, I am of opinion that if people choose to insert in a bill of sale two sets of clauses which, assuming that they produce the same result, are expressed in different words, they make the true interpretation of the bill of sale a puzzle to any one who reads it, and on that ground it is invalid. In my opinion, therefore, this bill of sale is void, and the appeal fails.

SIR JAMES HANNEN read the following written judgment:—This was an interpleader action, tried before Bowen, L.J., without a jury, in which the question was, whether certain goods seized by the sheriff of Middlesex were, at the time of the seizure, the property of the claimants as against the execution creditor.

The title of the claimants was based on a bill of sale given by one Robert Webb to the claimants, and the first question which arises is, whether or not the bill of sale is void under the 9th section of the Bills of Sale Act (1878) Amendment Act, 1882, on the ground that it is not "in accordance with the form" in the schedule annexed to the Act.

The covenant in this bill of sale which the learned judge held to be not in accordance with the form, and which he, therefore, held rendered the bill of sale void, is, so far as is material, as follows:—[His Lordship stated the effect of the above covenant to replace and repair articles destroyed, injured, or deteriorated, and of the power to seize in default, and continued:—] The learned judge held that this covenant is not "necessary for maintaining the security," and, therefore, that it purported to give a power to seize and take possession for a cause not being one of those enumerated in the 7th section of the Act.

I concur with the learned Lord Justice in thinking that the fact that the parties have agreed that this covenant is necessary for the maintenance of the security does not make it so, and that it is in each case incumbent on the Court to decide whether the

particular covenant impeached is or is not necessary for the maintenance of the security. I think that the true interpretation of these words, is that the covenant must be necessary for the maintenance of the security created by the bill of sale, and that they do not mean the maintenance of a sufficient security less than that agreed to be given. In this case the security given was that of a great number of articles of furniture liable to destruction or injury. If such destruction or injury should occur the security would be pro tanto diminished, and the only way of guarding against this diminution was, to stipulate that the articles destroyed or injured should be replaced or repaired. It appears to me, therefore, that this covenant is essentially necessary for maintaining the security agreed on, and, if I had been required to give an example of the meaning of the words under consideration, I should have selected this as the most obvious. I think, also, that the 4th section of the Act shews by implication that a covenant of this kind was contemplated as proper to be introduced into the bill of sale. That section requires that the bill of sale shall have a schedule of the assigned property attached thereto, and shall have effect only in respect of the chattels specifically described in the schedule, and makes the bill of sale void, *except as against the grantor*, in respect of any personal chattels not so described. Articles supplied in the place of any destroyed could not be described in the schedule; but as against the grantor a covenant to supply them would be good. The subjecting of articles not described in the schedule to the operation of the bill of sale as against the grantor is, therefore, a part of the security which it is lawful for the grantee to demand, and it can only be maintained by a covenant such as the one under consideration.

But it was contended that it was not necessary that there should be a power to seize upon the destruction or deterioration of a single article. This argument is based on the assumption that the Act means, that a right of seizure may only be given for breach of a covenant necessary for the maintenance of a sufficient security, which, as I have already stated, does not appear to me to be the true construction of the Act. On this point assistance may be derived from the Act. By s. 7, sub-s. 2, the parties may agree that there shall be a power to seize if the grantor suffers the

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goods, "*or any of them*," to be distrained for rent. Thus, if a small portion of the goods were on different premises from the bulk, and, though that bulk might be sufficient security, the grantee would be entitled to seize the whole, and the same right would exist, though the distress might be for a very small sum, after payment of which ample security would remain.

If the covenant is itself necessary for maintaining the security the Act recognises the right to seize upon its breach, though it may work a hardship in the particular case, and, indeed, the possibility of hardship arising from the legal enforcement of the right to seize is foreseen and guarded against by the proviso to the 7th section, by which it is enacted that, within five days from the seizure, the grantor may apply to a judge, who, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from selling the chattels, or may make such other order as may seem just. In the case supposed, therefore, of the destruction of a single article, the grantee might replace it or tender its value within five days of the seizure, and obtain relief.

Further, it was said that it was not necessary for maintaining the security that the right to seize should arise if the grantor did not "forthwith" replace or repair the articles destroyed or deteriorated. I find in Burrill's Law Dictionary, citing Chitty, Gen. Prac., 3rd Ed., vol. iii. p. 82, that "forthwith" imports "that the requisite act shall be performed as soon as by reasonable exertion, confined to that object, it might be; and which must consequently vary according to the circumstances of each particular case," or, shortly, "within a reasonable time." If this be the meaning of "forthwith," it adds nothing to the force of the words with which it is connected; but, if it does import some greater degree of expedition than would be implied in its absence, it appears to me that it is necessary for maintaining the security agreed on that a portion of it, if lost, should be made good with as little delay as possible.

I am of opinion, therefore, that the bill of sale is not vitiated by this particular covenant.

But there are several other covenants which the parties have agreed are necessary for maintaining the security, and, if any

one of them is not so, it must now be held that the bill of sale is void.

The first of these is the covenant that the grantor "will not remove the said chattels and things, or any of them, from the premises where they now are." It is said that this is bad, because it is in addition to the covenant that the grantor shall not "fraudulently" remove the goods from the premises, which is one of the grounds of seizure permitted by s. 7, sub-s. 3. But sub-s. 3 sanctions an additional right to seize, beyond that contained in sub-s. 1, which is upon breach of any covenant necessary for maintaining the security. Is, then, a covenant not to remove the goods necessary for maintaining the security? Here, again, I think that the fixing a place where the goods are to remain is a part of the security agreed upon. This would be very obvious if it were the case of plate deposited at a banker's, but the validity of the covenant cannot depend upon the degree of safety afforded by the particular locality chosen for the custody of the goods. The grantees had a right to stipulate for this particular safeguard, that the goods should not be removed from the place where they were without their consent. The insurance against fire would probably be vitiated by their removal, and other circumstances might be imagined which would make it reasonable to insist on this provision. The extreme case was suggested that the removal might be to save the goods from fire. I do not think that it would be a reasonable construction of the covenant to hold that it would be broken by saving the chattels from being burnt in the house, more especially as the leaving them there, if they could be removed, would be a breach of the next covenant, not to permit them to be destroyed. But, even if an innocent removal of the goods would be a breach of the covenant, still, as I consider the covenant necessary for the maintenance of the security agreed on, I think that, if the grantees were to seize for such a breach, the grantor might seek relief under the proviso of the 7th section, and I cannot entertain a doubt as to what order a judge would deem just in such a case.

The next covenant to be considered is that the grantor will, on demand in writing, produce and shew to the grantees his last receipt for rents, rates, and taxes in respect of the premises,

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omitting the words contained in the 4th sub-section of s. 7 "without reasonable excuse."

It was argued that it cannot be necessary for maintaining the security that the grantor should covenant to produce a receipt, though it might be accidentally lost or burnt. On the other hand, it may be said that it is not difficult to give an apparently reasonable excuse, but that, if there were reason to think that the excuse were not true, and the goods were liable to distress for rent, &c., if it were untrue, it would be reasonable that the grantees should have the power to take possession, so as to put the goods beyond the reach of seizure by any one else while the facts were being investigated, and so that the covenant would be necessary for the maintenance of the security, and I have little doubt that it has, in fact, been found to be necessary. Having regard to the power given to the judge under the proviso in the 7th section, I am disposed to hold that the bill of sale was not invalidated by this covenant.

But it is unnecessary to express a definite opinion on this point, as there remains one covenant which appears to me to make the bill of sale bad under the existing decisions of the Court of Appeal. Before these decisions it might have been contended that "in accordance with the form" meant no more than consistent with the form given in the schedule, and that the parties might introduce innocent covenants, not depriving the grantor of any of the safeguards given by the Act; but it must now be taken to be settled by *Ex parte Stanford* (1) that "a divergence from the form given in the schedule becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." There is a covenant in this bill of sale by the grantor that, after the expiration of five days from the seizure, the grantees shall have the right to sell the goods and "receive and take the moneys to arise from such sale, and therewith in the first place to reimburse and pay themselves the costs and charges and expenses of and attending such sale, including

(1) 17 Q. B. D. 270.

therein the full charges and commission of the mortgagees as auctioneers, as if they were selling on behalf of the mortgagor." But for this stipulation the grantees, in the event of their selling under the bill of sale, would not have been entitled to deduct their charges and commission as auctioneers. This, therefore, is a provision for securing to themselves a larger advantage than they would have had if the statutory form had been followed. It is not a provision for the maintenance of the security, but a provision for obtaining for the grantees, in addition to that security, their trade profit as auctioneers on the sale.

I have omitted to consider in its proper place an argument addressed to us, that, even if the powers of seizure given in the covenants of the bill of sale are wider than is permitted by the 7th section, those powers are controlled and limited by the concluding proviso of the bill of sale, copied from the form in the schedule, that the chattels assigned shall not be liable to seizure for any cause other than those specified in s. 7. I am of opinion that, even if this proviso would limit the effect of the previous covenants, which is certainly not clear, seeing that the grantor has covenanted that the powers given by the covenants are declared and agreed to be necessary for the maintenance of the security, the insertion of an express covenant not necessary for the maintenance of the security, with this stipulation that it shall be deemed to be necessary, is "calculated to mislead those whom it is the object of the Act to protect," and, therefore, that it is a substantial divergence from the form given in the schedule to the Act, according to the decision of this Court in *Ex parte Stanford.* (1)

Lastly, it was contended that, assuming the bill of sale to be void, it was proved by the facts of the case that the grantor intended to give and did give to the grantees possession of the goods and an interest in them, irrespective of the bill of sale. This is purely a question of fact. I do not doubt that it would be competent for a debtor, who was aware of the invalidity of a bill of sale, to give his creditor a right to seize the goods comprised in it, and to acquire a property or beneficial interest in them, irrespective of the bill of sale. But, if the debtor only

(1) 17 Q. B. D. 259.

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intends to carry out, on his part, the provisions of the bill of sale, and to permit the creditor to exercise his rights under it, no right in addition to or other than those created by the bill of sale will be conferred.

The evidence on this point appears to have been that the grantor merely told the grantees that he had sold his equity of redemption, and that they must take possession of the goods if they wished to recover their money. The learned Lord Justice found as a fact that this merely meant that the grantees had better for their own safety put in force their powers under the bill of sale. I do not see how he could have come to any other conclusion, and the result is that the grantees' rights depend solely on the bill of sale. For the reasons already given, I think that the bill of sale is invalid, and that this appeal must therefore be dismissed.

FRY, L.J., read a written judgment as follows:—In this case Bowen, L.J., has held a bill of sale to be void as not having been made in accordance with the statutory form, and the question for our decision is, whether he was right in so holding, or, to state the question in the terms of the decision of this Court in *Ex parte Stanford* (1), whether it has any legal effect which either goes beyond or falls short of that which would result from the statutory form, or whether it would be calculated reasonably to deceive those for whose benefit the statutory form is provided. If either of those questions be answered in the affirmative the bill of sale is void.

The bill of sale contains a covenant by the grantor that he will not permit or suffer the chattels and things assigned, or any part thereof, to be destroyed or injured, or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear thereof, and will, whenever any of the chattels and things were destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same. The bill of sale further contained a proviso enabling the grantees, in case default should be made by the grantor in performance of any of his covenants before contained, and immediately on such default to seize the

(1) 17 Q. B. D. 271.

chattels, and after five days to sell the same. Such a power can be justified only under the 7th section of the Act, if it be "necessary for the maintenance of the security." The Lord Justice has held that it is not necessary: with that conclusion I am not able to concur. It appears to me that, if the chattels were allowed to be destroyed, or injured, or deteriorated, and were not replaced, repaired, or made good, the security would be lessened, and not maintained, and, consequently, that covenants for the replacement and repair of any objects destroyed or injured are necessary for the maintenance of the security. It was argued that the maintenance of the security involves only the maintenance of the grantees' title, but I cannot concur in this argument. The security is maintained only when the subject-matter of the charge, and the grantees' title to that subject-matter, are both preserved in as good plight and condition as at the date of the bill of sale. The bill of sale in question, however, contains a declaration of the trusts of the sale moneys, enabling the grantees, who are co-partners as auctioneers, to pay themselves the costs, charges, and expenses of and attending the sale, including therein "their full charges and commission as auctioneers, as if they were selling on behalf of the mortgagor." In my opinion, the statutory form of a bill of sale (whether it be considered as importing the power of sale from the Conveyancing Act of 1881 or not) would not confer on grantees any authority, in case they sold, to pay themselves their charges and commission as if they had sold for the mortgagor: see *Matthison* v. *Clarke*. (1)

The bill of sale in question, therefore, appears to me to have a legal effect more in favour of the grantees than the statutory form, and consequently the appeal fails. From my silence on the other numerous points argued no assumption must be made as to my opinion upon them, as in the view I take I do not think it is needful to express any opinion upon them. I may, however, say that the bill of sale appears to me to have been drawn in a manner calculated to embarrass the reader, and with a highly perverse ingenuity.

SIR JAMES HANNEN. I wish to state the reason why I have gone so fully into the question whether the covenant upon which

(1) 3 Drew. 3.

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Bowen, L.J., held the bill of sale to be invalid was or was not a good one. That question appears to me to be of great practical importance, for such a covenant is very likely to be introduced into bills of sale. Therefore, though I have come to the conclusion that the bill of sale is void on another ground, I thought it right to state my reasons for holding that it was not void on the particular ground on which Bowen, L.J., based his decision.

LORD ESHER, M.R. I also desire to say that in my opinion the particular ground taken by my learned Brother Bowen cannot be maintained.

Appeal dismissed.

Solicitor for appellants: *R. Furber.*

Solicitors for respondents: *Burgess & Cosens.*

W. L. C.

March 2, 3.

THE QUEEN *v.* THE MAYOR AND CORPORATION OF LIVERPOOL.

Liverpool Court of Passage—Rules of Court—Power to make Rules concerning Practice—Rule ordering Security for Costs—Invalidity—Liverpool Court of Passage Acts (6 *&* 7 *Wm.* 4, *c. cxxxv., s.* 4; 16 *&* 17 *Vict. c. xxi., s.* 52).

By 6 & 7 Wm. 4, c. cxxxv., s. 4, the assessor of the Liverpool Court of Passage may make rules and regulations concerning the practice and costs of the Court.

The assessor made a rule that in frivolous and vexatious actions the registrar should have power to order the plaintiff to give security for the defendant's costs:—

Held, that the statute did not give power to make such a rule, and the rule was invalid.

MOTION on behalf of the plaintiff in an action commenced in the Liverpool Court of Passage for a prohibition directed to the mayor and corporation of Liverpool and the defendants in the action, to prohibit the enforcement of an order made by the registrar of the Court that security for the costs of the defendants be given by the plaintiff.

By 6 & 7 Wm. 4, c. cxxxv., s. 4, the assessor of the Court of Passage may from time to time make such rules and regulations concerning the practice and costs of the Court in personal actions as to him shall appear to be expedient.

By 16 & 17 Vict. c. xxi., s. 52, the powers conferred by s. 223 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which empowered the judges to make rules of court, may be exercised by the assessor of the Court of Passage with the approbation of one of the judges of the superior Courts of Common Law.

In the year 1882 the assessor made the following General Order, No. V.:—

"Whereas it is desirable that in the following cases security for costs should be required to be given, namely:

(1.) In the case of frivolous or vexatious actions.

(2.) In the case of actions by the assignees or trustees of a bankrupt or insolvent.

(3.) In the case of actions by a tenant, whose action is substantially that of his landlord.

(4.) In the case of actions by a limited company, whose assets will probably be insufficient to pay if unsuccessful.

(5.) In the case of actions by a prochein ami, who is shewn not to be a substantial person.

(6.) In the case of actions where the plaintiff is only a nominal plaintiff.

I do order that the registrar shall be at liberty in every such case, upon the application of the defendant, or his solicitor, upon cause duly sworn to his satisfaction, to make an order that security for the costs of the defendant, by bond or otherwise, to the satisfaction of, and to an amount to be fixed by, the registrar, shall be given by the prochein ami, the person or persons, or company, bringing or prosecuting any such actions; and any such order shall be enforced in the same manner as any other order of the said Court is now or may hereafter be enforceable, and shall be subject to such terms as to stay of proceedings or otherwise as by the said registrar shall be deemed fit."

The order for security for costs was made on the ground that in the opinion of the registrar the action was frivolous and vexatious.

J. W. Mansfield, for the plaintiff. The rule is bad because it has not been approved by a judge of the High Court as required by 16 & 17 Vict. c. xxi., s. 52, which limits the power of making

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rules conferred by 6 & 7 Wm. 4, c. cxxxv., s. 4. If this is not so, still the rule is ultrà vires and void, not being warranted by the earlier Act, which gives power to make rules concerning practice. An order to give security for costs imposes a limitation on the common law right of all persons to use the process of the Court, and therefore is not a matter concerning practice. The rule purports to take away a legal right, and is not warranted by the statute. The question as to ordering costs of appeal is entirely different, because there the respondent has the decision of the Court in his favour. The action is not frivolous and vexatious, so the registrar had no jurisdiction to make the order even if the rule is good. He could not give himself jurisdiction by finding the fact wrongly: *Liverpool United Gaslight Co.* v. *Overseers of the Poor of Everton.* (1)

T. Willes Chitty, for the corporation of Liverpool, and *Synnott*, for the defendants. There was power under 6 & 7 Wm. 4, c. cxxxv., s. 4, to make the rule. Security for costs is a matter of practice, and was so treated by the judges of the Supreme Court, when they made rules 6 and 6*a.* of Order LXV. of the Rules of 1883, under the powers conferred by s. 17 of the Judicature Act, 1875 (38 & 39 Vict. c. 77). Rule 6*a.*, which was passed after the decision in *Redondo* v. *Chaytor* (2), imposed a liability to give security for costs which did not exist before. There is clearly power to stay proceedings or dismiss an action on the ground that it is frivolous and vexatious, and it follows that there must be power to impose terms on which the action may be allowed to proceed. The action here is frivolous and vexatious. The registrar is the person to decide as to this, and the Court will not review his finding on an application for a prohibition.

The following authorities were also referred to: *Bosewell* v. *Irish* (3); *Brittain* v. *Kinnaird* (4); *Ex parte Smyth* (5); *Reg.* v. *Bolton* (6); *Ex parte Rayner* (7); *In re Bowen* (8); *Prowse* v. *Loxdale* (9); *Attorney-General* v. *Sillem* (10); *Brown* v. *Cocking* (11);

(1) Law Rep. 6 C. P. 414.
(2) 4 Q. B. D. 453.
(3) 4 Burr. 2105.
(4) 1 B. & B. 432.
(5) 3 A. & E. 719.
(6) 1 Q. B. 66.
(7) 5 D. & L. 342.
(8) 21 L. J. (Q.B.) 10.
(9) 3 B. & S. 896; 32 L. J. (Q.B.) 227.
(10) 10 H. L. C. 704.
(11) Law Rep. 3 Q. B. 672.

Castro v. *Murray* (1); *Dawkins* v. *Prince Edward of Saxe-Weimar* (2); *Speers* v. *Daggers* (3); *Metropolitan Bank* v. *Pooley* (4); *Cowell* v. *Taylor* (5); *Willis* v. *Earl Beauchamp.* (6)

Mansfield, was not heard in reply.

The judgment of the Court (Day and Wills, JJ.) was delivered by

WILLS, J. With regard to the question whether we should have power to overrule the decision of the registrar that the action is frivolous and vexatious, we give no definite opinion, but we are inclined to think that the view put forward by Mr. Chitty and Mr. Synnott is right.

On comparing s. 4 of 6 & 7 Wm. 4, c. cxxxv. with s. 52 of 16 & 17 Vict. c. xxi. we are clearly of opinion that the two sets of powers may co-exist, and we therefore think it was competent to the learned assessor of the Court of Passage to make rules regulating the practice of the Court.

It becomes, therefore, necessary, in order to decide whether the rule is valid or not, to consider what it is that the rule proposes should be done. No one questions the power of the Court of Passage to stay proceedings if they are an abuse of its process, and it is at first sight a taking proposition that where there is power to stay proceedings the lesser power must be included in the greater power, so that terms may be imposed on which the action may be allowed to proceed, but when we come to consider to what class of action the rule in question is applied, it becomes apparent that the proposition contains a transparent fallacy. The rule applies to frivolous and vexatious actions only. These are actions which ought not to be brought at all, and which are an abuse of the process of the Court; that is the ground, and the only ground, on which the Court can act in staying proceedings. If an action is an abuse of the process of the Court, to which the Court will not lend itself, how can there be power to make a rule by which, if a man is rich enough, he is allowed to prosecute

(1) Law Rep. 10 Ex. 213.
(2) 1 Q. B. D. 499.
(3) 1 Cababé & Ellis, 503.
(4) 10 App. Cas. 210.
(5) 31 Ch. D. 34.
(6) 11 P. D. 59.

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such an action? This is a reductio ad absurdum, and it is clear that the learned assessor did not perceive the consequences of such a rule, namely, that the registrar may allow an action which he thinks is an abuse of the process of the Court to proceed if the plaintiff has sufficient means to be able to find security for costs. When the effect of the rule is understood it becomes apparent that the making of such a rule is not a use but an abuse of the power given by the Act. Suppose a rule were made providing that a successful defendant might be ordered at the discretion of the registrar to pay the plaintiff's costs, in one sense that would be a rule of practice, but I cannot think that there is any power to make such a rule; it would not be a legitimate exercise, and therefore not an exercise at all, of the power to make rules as to practice.

It seems to us that the essence of this rule is to give a discretion to the registrar to allow an action to proceed upon terms, when the only ground for his interfering in the matter at all is the fact that the action is of such a character as to be an abuse of the process of the Court, and that ex hypothesi, therefore, it ought not to be allowed on any terms, and on that broad ground we are of opinion that the making of the rule in question is not an exercise of the power to make rules of practice given by the statute, that the rule is, therefore, invalid, and the application for a prohibition must be granted.

Motion granted.

Solicitors for plaintiff: *Nicholson & Graham, for T. E. Donnison, Liverpool.*

Solicitors for defendant: *J. J. & C. J. Allen, for J. L. Johnson, Liverpool.*

Solicitors for the corporation: *Venn & Co., for Atkinson, Town Clerk of Liverpool.*

P. B. H.

[IN THE COURT OF APPEAL.]

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March 7.

PICKER *v.* THE LONDON AND COUNTY BANKING COMPANY, LIMITED.

Negotiable Instrument—Foreign Bond—Conflict of Laws—Custom of Merchants—Bonâ fide Holder, Right of.

An instrument that is negotiable by the law of a foreign country is not a negotiable instrument by the law of England, so as to give a bonâ fide holder for value a good title against an owner of the instrument, from whom it has been stolen, in the absence of any evidence of a custom of merchants in this country to treat it as negotiable.

APPEAL from the judgment of A. L. Smith, J.

The action was brought by the plaintiff to recover possession from the defendants of certain Prussian Consolidated 4½ per cent. bonds which the plaintiff alleged to belong to him. The defendants set up by their defence that these bonds were negotiable instruments of which they were bonâ fide holders for value.

The facts at the trial before the learned judge without a jury were as follows:—

It appeared that the bonds, in respect of which the action was brought, were bonds issued by the Prussian Government. The coupons for the interest upon such bonds were not attached to the bond, but were contained in a separate document. The bonds in question were stolen from the plaintiff while travelling, the coupon sheets which belonged to them remaining in his possession. The bonds having come into the possession of a customer of the defendants, by what means did not appear, were deposited by him with the defendants to secure an overdraft, the defendants not being aware of anything wrong in relation to them.

The evidence of Prussian lawyers taken on commission was adduced on the part of the defendants to shew that by the law of Prussia these bonds without the coupon sheets were payable to bearer and transferable by delivery, and that a bonâ fide holder for value of such bonds, without notice of any theft or fraud in relation thereto, would be entitled to payment of them. (1)

(1) The exact nature of the bond as a legal instrument according to Prussian law, and the effect of the expert evidence, were the subject of much discussion during the argument, but it will be seen from the judgment that it is unnecessary to give further details as to the terms of the bond and the

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Evidence of Prussian mercantile men was adduced for the plaintiff to shew that by the general custom of trade on the Berlin Stock Exchange, and amongst Prussian bankers and merchants, bonds of the kind in question were not negotiable without the coupons belonging thereto. The plaintiff also called an English stockbroker and a money broker, who gave evidence to the effect that in the English markets these bonds were not negotiable without the coupon sheets. The learned judge was of opinion that, there being no evidence of any custom of merchants making these bonds negotiable without the coupon sheet in this country, the defendants failed to shew that they were negotiable instruments for the purpose of giving a bonâ fide holder for value without notice of the theft a good title to them as against the true owner. He therefore gave judgment for the plaintiff.

Charles, Q.C., and *C. K. Francis*, for the defendants. It is contended that these instruments are negotiable instruments within the doctrine of *Miller* v. *Race* (1), as being instruments payable to bearer, the property in which passes by delivery. It is not necessary for this purpose that the instruments should be negotiable by reason of any custom among merchants in England. If they are negotiable instruments by the law of Prussia, it is contended that by the law of this country the property in them passed to the defendants as bonâ fide transferees for value without notice of the theft. All that is necessary to constitute them negotiable instruments in that sense is that by the law of the place where the bond is issued the effect of it is such that the full proprietary right therein passes by delivery. The English Courts will judge of the rights of the holder by the law of Prussia, and, if that law treats the bonâ fide holder without notice of the theft as the proprietor of the bond, the English law will treat him as such also: *Gorgier* v. *Mieville* (2); *Crouch* v. *Crédit Foncier of England* (3): *Lang* v. *Smyth* (4); *Goodwin* v. *Robarts* (5); *Wookey* v. *Pole* (6); *Dixon* v. *Bovill.* (7)

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evidence, as the judgment proceeded on the assumption that by Prussian law these were negotiable instruments.

(1) 1 Burr. 452; 1 Sm. L. C. 8th Ed. 529.

(2) 3 B. & C. 45.

(3) Law Rep. 8 Q. B. 374.

(4) 7 Bing. 284.

(5) 1 App. Cas. 476.

(6) 4 B. & A. 1.

(7) 3 Macq. Sc. Ap. 1.

Bigham, Q.C., and *Herbert Reed*, for the plaintiff, were not called upon.

LORD ESHER, M.R. In this case the plaintiff brings his action of detinue to recover from the defendants certain Prussian bonds of which the defendants have possession. His case is that the bonds were stolen from him, that no title to the bonds passed to the thief, and that the defendants cannot therefore make a title to them. The defendants in answer say that, although the thief had no property in the bonds, yet the delivery of them to the defendants, who took them bonâ fide and for valuable consideration, passed the property in them to the defendants, on the ground that they were what are known in English law and trade as negotiable instruments. This contention raises the question whether these bonds without the coupons were for this purpose negotiable instruments according to the law of England. Evidence was given by Prussian experts that according to the law of Prussia the property in these bonds without the coupons passes by delivery. I will assume for the purposes of this case that it was proved that the bonds without the coupons were negotiable instruments in Prussia in the fullest sense of the term. I doubt very much whether there was sufficient proof that they were. The experts on whose evidence the defendants relied were Prussian lawyers. If the question of the negotiability of these instruments depended on a Prussian enactment, or the construction of the terms of the instrument, then such evidence might be the proper evidence on the subject; but, so far as it might depend on a question of trade custom in Prussia, I doubt whether the evidence of lawyers would be the proper evidence. I rather think that the evidence of the Prussian witnesses, whose business would make it likely that they should know the custom of trade in Prussia, tended to shew that these bonds without the coupons were not negotiable instruments by the custom of trade there. But I will assume that they were negotiable instruments in Prussia in the fullest sense of the term. The question is, what under those circumstances is the English law with respect to them. The common law of England does not allow a party to a contract to transfer his right under the contract to another person

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except in certain cases. Such a transfer of a chose in action could of course be made under the provisions of a statute: and in the case of instruments which by the custom of merchants recognised by the law of England had become negotiable instruments. But it appears to me that in order to establish such an exception to the common law rule some custom of merchants obtaining in this country must be proved, or some English statute must be relied on. If all that can be proved is that by the law or custom in Prussia the instrument is negotiable, then, as it seems to me, the answer is that an English Court and English merchants are not bound by a law or custom of trade in Prussia. To prove that an instrument is negotiable in the sense required, there must be something to make it so by English law. There is no question here of any statute: nor is it shewn that there is any custom of merchants in this country to treat these bonds without the coupons as negotiable. It is not necessary, I think, to decide in this case what would be primâ facie evidence of such a custom. It was not disputed that the evidence in this case justified the learned judge in the Court below in saying that there was nothing to shew that by the custom of trade in England these bonds were negotiable, so as to be negotiable instruments in the full sense of the term. On the contrary the evidence was that they were not, for I understand the effect of the evidence of the plaintiff's witnesses not to be confined merely to the practice of the London Stock Exchange, but as referring to the practice among merchants and business men in general. If it were necessary to say what would be primâ facie evidence of the negotiability of an instrument in this or in a foreign country, I should be disposed to say that evidence that an instrument is by the custom of trade negotiable here would be strong evidence that it is negotiable in the country of its issue, but that evidence that it is negotiable by the custom of trade in the country of issue would not be evidence that it is negotiable here. It seems to me that these considerations are sufficient to decide the case. None of the cases cited, such as *Goodwin* v. *Robarts* (1), *Lang* v. *Smyth* (2), and *Wookey* v. *Pole* (3), seem to contravene the view I have expressed,

(1) 1 App. Cas. 476. (2) 7 Bing. 284.
(3) 4 B. & A. 1.

viz., that, to render a foreign instrument negotiable here in the full sense of the term, it is not sufficient to shew that by the foreign law or custom it is treated as negotiable. On the contrary they all seem to me to support it. For these reasons I think this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. These bonds having been the property of the plaintiff before they were stolen from him, the question is whether the defendants have nevertheless a good title to them, having taken them bonâ fide and for valuable consideration. The broad principle of law is that except in the case of a sale in market overt no person can acquire a title to a personal chattel from a person who is not the owner. There is an exception to this principle in respect of certain instruments of contract well-known to the law merchant, in the case of which, by the recognised custom of merchants, the property in the instrument and all rights upon it pass by the delivery of the instrument. A further exception to the rule would be where an instrument, though not possessing the quality of negotiability at common law or by any custom of merchants, has that quality attached to it by some statute of the realm. Among the rights which are ordinarily created by such instruments is the right of suing upon the contract therein contained. At common law in general a chose in action is not transferable. Therefore the right of action can only pass by delivery of the instrument where the instrument is negotiable or clothed by statute with the attributes of a negotiable instrument. It may be said that in the case of these bonds there is not, strictly speaking, a chose in action, because the bonds only import a promise by a foreign government which could not be sued on; but it is sufficient for the present purpose to say that, in my opinion, the case for the defendants cannot be put higher than if the promise which the bond imports were one on which there was a right of action. The question then would be whether this right could be passed at law so far as English law is concerned, otherwise than by virtue of some statute or some custom of merchants prevailing in this country. I do not see in this case any evidence that these bonds are negotiable by any custom of merchants in this country: there is no evidence

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whatever of any mercantile custom whereby such instruments as these bonds without the coupons are treated as part of the mercantile currency recognised in the kingdom, unless the evidence with regard to their negotiability in Prussia could be treated as amounting to such evidence. But at the utmost that would only amount, as it seems to me, to evidence that such instruments form part of the mercantile currency in Prussia. I do not say that the evidence does amount even to that, but I will assume for a moment that it does. Then is evidence that an instrument or piece of money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency in this country? Such a proposition is obviously absurd, for, if it were true, there could be no such thing as a national currency. For the same reason, as it appears to me, that a German dollar is not the same thing as its equivalent in English money for this purpose, and that the barbarous tokens of some savage tribe, such as cowries, are not part of the English currency, evidence that the instrument would pass in Prussia as a negotiable instrument does not shew that it is a negotiable instrument here. For these reasons it appears to me that the defence fails.

FRY, L.J. I am of the same opinion. The question is whether these bonds are negotiable instruments according to the law of England. Without attempting to give an affirmative definition of a "negotiable instrument," it is sufficient to say that it is clear that no instrument can be negotiable in the sense required unless either by statute or custom it is so transferable as to give the transferee all the rights of the transferor in this country. It seems obvious that the question whether an instrument is negotiable in this sense must be determined with reference to the law and custom in this country, for, if it were otherwise, the consequences mentioned by my brother Bowen would seem to follow: and, if it were proved that cowries are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money. It being clear, therefore, that the custom in this country must be looked to in order to determine whether these instruments were negoti-

able, in the present case there was no evidence of any custom here to treat them as negotiable instruments. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Goldberg & Langdon.*

Solicitors for defendants: *Harries, Wilkinson & Raikes.*

E. L

THE GUARDIANS OF THE PARISH OF SAINT PANCRAS, APPELLANTS; THE GUARDIANS OF THE NORWICH INCORPORATION, RESPONDENTS.

Feb. 26.

Poor Law—Settlement—Derivative Settlement from Father—Child over Sixteen at Date of Inquiry—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A legitimate child left the parish of his birth, and went with his father into another parish, where the father resided and acquired a settlement while the child was under sixteen, and where the child resided with his father until he was over sixteen. Afterwards they left that parish, and the child became chargeable as a pauper.

On appeal against an order adjudging the pauper to be settled in the parish of his birth:—

Held, that the pauper while under the age of sixteen had acquired a derivative settlement from his father in the parish in which they had resided, and that, not having afterwards acquired any other settlement, he retained such derivative settlement, and therefore the order must be quashed.

SPECIAL CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11.

On November 6, 1885, William Henry Bandy (hereinafter called "the pauper") was, under an order of two justices for the city and county of the city of Norwich, directed to the superintendent of the Norwich Pauper Lunatic Asylum, removed to the said asylum, and became chargeable to the respondent incorporation.

On February 15, 1886, an order was made by two justices for the said city and county adjudging the pauper to be legally settled in the appellant parish, and this order is now appealed against.

The facts of the case are as follows:—

The pauper is the legitimate son of William Henry Bandy the

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elder and Maria his wife, and was born on September 12, 1868, in the appellant parish.

On September 27, 1879, the pauper's father rented a separate and distinct tenement in the parish of St. Mary, Lambeth, in the county of Surrey, at a rental of 36*l.* per annum, and resided in and occupied such tenement, and was assessed to and paid the poor-rates and all other rates assessed in respect thereof, as well as the rent payable under such yearly hiring, during the whole of the period between September 27, 1879, and the month of May, 1885, whereby he gained a settlement in the parish of St. Mary, Lambeth.

On September 12, 1884, when the pauper attained the age of sixteen years, William Henry Bandy the elder was settled as aforesaid in the parish of St. Mary, Lambeth.

During the whole of the period between September 27, 1879, and the month of May, 1885, William Henry Bandy the elder resided under such circumstances as in accordance with the statutes in that behalf rendered him irremovable from the parish of St. Mary, Lambeth, and the pauper resided continuously with his father and the other members of and as part of his father's family, and was during such period supported by him; and if the Court are of opinion that the pauper was by reason of the circumstances herein stated irremovable during the said years, then beyond what appears in this case nothing occurred whereby the pauper became removable from the said parish.

The pauper, with his father and the other members of the family, in or about the month of May, 1885, went to reside in Norwich, the pauper being of the age of sixteen years and eight months.

The said pauper lunatic has not, unless the facts stated herein establish that he has acquired a settlement by residence in the parish of St. Mary, Lambeth, acquired any settlement of his own.

The appellants contend that previously to the pauper attaining the age of sixteen years he took the settlement gained by his father, in the parish of St. Mary, Lambeth, and that since attaining the age of sixteen years the pauper has retained the settlement so taken by him. And, further, that the 34th section of

the Divided Parishes Act applies to any person, and that its provisions are not restricted by the 35th section, and that, therefore, the pauper has under the 34th section acquired a settlement by residence in the parish of St. Mary, Lambeth.

The respondents contend that at the date of the orders of November 6, 1885, and February 15, 1886, the settlement of the pauper was not in the parish of St. Mary, Lambeth, but was properly adjudged to be in the appellant parish, and also that the fact that the pauper lived with his father in the parish of St. Mary, Lambeth, during the time and in the manner herein stated did not confer upon him a settlement in the said parish within the meaning of the said statute.

Upon the argument of this case the Court are to be at liberty to draw from the facts stated herein any inference, whether of fact or of law, which might have been drawn therefrom had such facts been proved at a hearing of this appeal before the court of quarter sessions.

The question for the opinion of the Court is, whether the pauper was at the time of the making of the order appealed against settled in the appellant parish. If the Court shall be of opinion that he was so settled the order is to be affirmed, if otherwise, the order is to be quashed.

R. Cunningham Glen, for the appellants. The pauper has either a derivative settlement from his father, or a settlement acquired by "residence," in either case in the parish of St. Mary, Lambeth. Residence in the Poor Law Acts means where the pauper sleeps: *Blackwell* v. *England* (1); and see *Rex* v. *North Curry*. (2) The pauper had become irremovable by residence. The provisions of 24 & 25 Vict. c. 55, s. 2, shew that a child under the age of sixteen can acquire a status of irremovability: *Reg.* v. *Leeds Union* (3), *Wolstanton and Burslem Union* v. *Northwich Union* (4), and *Guardians of Holborn* v. *Guardians of Chertsey* (5) (reversed by the Court of Appeal, but on different grounds (6)), are authorities for the same proposition. It has been held that

(1) 8 E. & B. 541; 27 L. J. (Q.B.) 124.
(2) 4 B. & C. 953.
(3) 4 Q. B. D. 323.
(4) 46 L. T. 528.
(5) 14 Q. B. D. 289.
(6) 15 Q. B. D. 76.

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an illegitimate child residing with its mother may acquire a settlement by residence: *Reg.* v. *Abingdon* (1); *Guardians of Salford* v. *Overseers of Manchester.* (2) The pauper was irremovable from St. Mary, Lambeth, by 11 & 12 Vict. c. 111. The decisions as to a wife becoming irremovable, such as *Reg.* v. *Glossop* (3) and *Reg.* v. *St. George in the East* (4), may apply to the case of a child.

[DENMAN, J., referred to *Reg.* v. *Inhabitants of Combs.* (5)]

The judgments in *Reg.* v. *Guardians of Bridgnorth* (6) shew that the pauper has taken and retains the settlement acquired by his father.

H. Tindal Atkinson, for the respondents. The pauper, being a legitimate child, has not acquired a settlement by residence with his father and as part of his father's family: *Guardians of Salford* v. *Overseers of Manchester* (2); *Rex* v. *Much Cowarne* (7); *Reg.* v. *Overseers of St. Mary Arches, Exeter.* (8) To acquire irremovability there must be residence in each one of three consecutive years: *Guardians of Dorchester Union* v. *Guardians of Weymouth Union.* (9) Until he was sixteen the pauper was acquiring a derivative settlement from his father, so he cannot at the same time have been acquiring a settlement by residence. As he was over sixteen at the date when his settlement became the subject of inquiry and adjudication, he cannot be treated as having obtained a derivative settlement from his father: *Guardians of Edmonton* v. *Guardians of St. Mary, Islington.* (10)

Glen replied.

DENMAN, J. This enactment is extremely puzzling, and it is impossible to give any decision with great confidence, more particularly as there are expressions in the two last cases on the subject decided by the Court of Appeal which seem difficult to reconcile, but upon the whole, putting the best construction I can on these two sections, I think the result is this: s. 34 provides

(1) Law Rep. 5 Q. B. 406.
(2) 10 Q. B. D. 172.
(3) 12 Q. B. 117; 17 L. J. (M.C.) 171.
(4) Law Rep. 5 Q. B. 364.
(5) 5 E. & B. 892.
(6) 11 Q. B. D. 314.
(7) 2 B. & Ad. 861.
(8) 1 B. & S. 890; 31 L. J. (M.C.) 77.
(9) 16 Q. B. D. 31.
(10) 15 Q. B. D. 95, 339.

that "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

Now that section appears to me, applied to the facts of the present case, to have conferred upon the father of the pauper whose settlement is here in question a status of irremovability, which status of irremovability by the very terms of the section makes him a person who is to be deemed to be settled in that parish until he acquires a settlement in some other parish by a like residence or otherwise, and the facts of the case preclude the supposition that he had acquired any other settlement. Therefore I think that, so far as the father was concerned, he was a person who came within s. 34, and who had acquired a settlement in the parish of St. Mary, Lambeth, which is here the place relied upon as the place of settlement by the appellants. Then s. 35 has a negative proviso, to prevent persons obtaining derivative settlements except under certain circumstances: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen." Now, to stop there for a moment, as long as the pauper was a child under sixteen, down to the time when he attained the age of sixteen, he would have had the settlement which his father had. Then we come to other words which certainly create considerable difficulty: "which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." That would look as though the clause were in the first instance only intended to apply where the question arises when the child is under the age of sixteen, and that view has obviously impressed itself on the minds of some of the learned judges who have had the matter before them; but then follow these words: "and shall retain the settlement so taken until it shall acquire another." How can we put any construction on those words except the construction which in this particular case makes the pauper a person who has the settlement which,

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Denman, J.

before he reached the age of sixteen, was the settlement of the father? I think the cases cited by Mr. Glen warrant us in saying that there is nothing in the current of decisions which will prevent us from saying that the pauper himself, putting these two sections together, might come within s. 34. I do not think it is necessary to decide the case solely on that ground, or on that ground, because I think these subsequent words, "and shall retain the settlement so taken until it shall acquire another," necessarily compel us to hold that, where the parent has obtained a settlement which, if the question arose when the child was under sixteen, would be the settlement of the child, in such a case the child is not to go back to its birth settlement, but to retain the settlement of the father until it acquires another. What the object of the legislature may have been is only a matter of speculation, but it may have been thought that it is better and more reasonable that paupers should have their settlements in the places in which their parents had a tangible and substantial period of residence when the paupers were children up to the age of sixteen, and that they should retain that settlement, which was made the settlement of the parents by this Act, until they acquire another, rather than that they should go back in every case to the birth settlement, which would be the alternative. It appears to me that this is a rational construction, and it is obviously the construction which was put upon the Act in *Reg.* v. *Guardians of Bridgnorth.* (1) I think on the whole we should be flying in the face of that decision if we were to hold otherwise than that here the derivative settlement from the parent in the parish of St. Mary, Lambeth, was in fact gained. I think, therefore, the appeal ought to succeed.

MATHEW, J. I am of the same opinion. I do not understand that it is or could be disputed that if this question arose before the child was sixteen, the child's settlement would be determined by the settlement of its parent; but it is contended by Mr. Atkinson that a totally different state of things arises the moment the child attains the age of sixteen, and that the meaning of the Act of Parliament is that whereas the settlement on

(1) 11 Q. B. D. 314.

the last day of the sixteenth year would be the settlement of the father, on the first day of the seventeenth year it would be the place of the child's birth. I cannot see any reason for that legislation. It appears to me, looking at the language of the latter part of the section, that this cannot be what was meant, because in the case put, where the settlement is inquired into before the age of sixteen is arrived at, that settlement is to be retained subsequently. Why does not the same consequence follow when one is inquiring into the settlement after the age of sixteen? The settlement once acquired before the age of sixteen is, by the language of the Act of Parliament, to be retained until another settlement is acquired. It seems to me that this is the meaning of the judgment of the Master of the Rolls in *Reg.* v. *Guardians of Bridgnorth.* (1) That judgment I understand to have been assented to by both the other members of the Court, and we are bound by the decision, and we ought therefore to follow it. It is the best interpretation, apparently, that can be put on a statute which cannot be easily interpreted.

Judgment for the appellants.

Solicitor for appellants: *Rexworthy.*

Solicitors for respondents: *G. F. Hudson, Matthews, & Co., for Bailey, Cross, & Barnard, Norwich.*

(1) 11 Q. B. D. 314.

P. B. H.

1887
Feb. 28.

THE GUARDIANS OF THE POOR OF THE KINGSBRIDGE UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF THE PARISH OF EAST STONEHOUSE, RESPONDENTS.

Poor Law—Settlement—Widow—Children under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

A widow and her legitimate children, under the age of sixteen, became chargeable to the respondent parish, and an order was made for their removal into the appellant union, where the deceased husband and father had been settled:—

Held, that the word "wife" in s. 35 of the Divided Parishes Act, 1876, does not include a widow, and therefore, as the widow's settlement became the subject of inquiry after her husband's death, she did not take his settlement, and that under the words "shall take the settlement of its father, or of its widowed mother as the case may be," the children took their mother's birth settlement, and, therefore, the order must be quashed.

Guardians of Maidstone Union v. *Guardians of Holborn Union* (17 Q. B. D. 817) approved and followed.

SPECIAL CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11, on appeal against an order of removal.

On February 5, 1886, two justices for the county of Devon, upon the complaint of the respondents, ordered that Elizabeth Phillips, aged about forty-nine years, a widow, Richard Henry Phillips, aged over seven, and Charles Sydney Phillips, aged about three, all being poor persons then chargeable to the respondents' parish, should be removed thence to the appellants' union.

The pauper Elizabeth Phillips, formerly Steel, was born in the parish of Falmouth, in the county of Cornwall, and was married to Samuel Phillips on June 15, 1878. Richard Henry and Charles Sydney Phillips were the issue of that marriage.

Samuel Phillips was born in a parish within the appellants' union, and acquired no later settlement.

Samuel Phillips died on January 1, 1885, when the paupers became chargeable to the respondents' parish, and remained so up to the time of the making of the order of justices.

On the hearing of the appeal it was contended on behalf of the respondents that the paupers took the settlement of Samuel Phillips, deceased.

For the appellants it was argued that Elizabeth Phillips was

not then a wife, but a widow, and unless it could be shewn that her settlement had been adjudicated upon in her husband's lifetime, she did not derive her settlement from her husband, but retained her birth settlement, and that her children took the settlement from their widowed mother.

The court of quarter sessions made an order confirming the order of removal, subject to a special case.

The question for the opinion of the Court was whether this order of quarter sessions was right?

By the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

McKellar, for the respondents, shewed cause against a rule to quash the order of removal. The decision in *Guardians of Liverpool* v. *Overseers of Portsea* (1) shews conclusively that the widow and children in the present case take the deceased husband's settlement in the appellant union. That case was cited with approval in *Guardians of Headington Union* v. *Guardians of St. Olave's Union* (2) and in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (3), but was not referred to in *Guardians of Maidstone Union* v. *Guardians of Holborn Union.* (4) This last mentioned decision is contrary to the current of authority, and is incorrect.

J. A. Foote, for the appellants. With regard to the widow, *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (4) governs the present case, for it is a distinct decision that the term "wife" in 39 & 40 Vict. c. 61, s. 35, does not include a widow. In *Guardians of Liverpool* v. *Overseers of Portsea* (1) it was assumed, but not decided, that the wife took the settlement of her late husband; the case was argued as to the children only.

(1) 12 Q. B. D. 303.
(2) 13 Q. B. D. 293.
(3) 15 Q. B. D. 95, 339.
(4) 17 Q. B. D. 817.

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The word "child" in s. 35 does not include every one who has been a child, and therefore a pauper who is over the age of sixteen at the date of adjudication does not take a derivative settlement: *Reg.* v. *Guardians of Bridgnorth* (1), *Guardians of Edmonton* v. *Guardians of St. Mary, Islington.* (2) It follows that a woman who at the date of adjudication has ceased to be a wife, and become a widow, does not take a derivative settlement from her deceased husband. The children cannot be removed if the mother cannot be: 9 & 10 Vict. c. 66, s. 3. The words "of its father or of its widowed mother, as the case may be" in 39 & 40 Vict. c. 61, s. 35, mean that the child takes the settlement of its father if he is alive at the time of the inquiry, or of its mother if the father is then dead and she survives. The children, therefore, take the mother's settlement in the present case.

DAY, J. I am of opinion that as regards the widow we are bound by the decision in *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (3) to hold that a widow is not within the exception introduced by the words "except in the case of a wife from her husband," in s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61). The object of that section appears to be to abolish derivative settlements except where it would cause injustice to do so. Thus it is intended not to separate a wife from her husband during marriage, or children of tender years from their parents, or from their surviving parent, if the father or mother is dead. Therefore a provision has been introduced into the section, the effect of which is that where at the time of adjudication the Court is dealing with the question of a wife and husband, or with the case of a child under the age of sixteen and its parents, there is a derivative settlement. In the case of a widow, however, there is no injustice in holding that she cannot derive a settlement from her deceased husband, and that in consequence she reverts to her original settlement. Therefore I should concur with the view adopted by the judges who decided *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (3), even if I were not bound by the decision, but in my

(1) 11 Q. B. D. 314. (2) 15 Q. B. D. 95, 339.
(3) 17 Q. B. D. 817.

opinion we are bound by it, and therefore it follows that the order of removal cannot stand.

WILLS, J. I am of the same opinion. The key to the decision is to be found in the view which has been adopted by the Court of Appeal and by this Court, that the expression "shall be deemed to have derived a settlement," means "shall at the moment of adjudication be deemed to have derived a settlement." At first sight this seems a forced construction, but I think it is the correct one, and if so, the expressions used in the section are all to be looked at with reference to this view. The result is that when the case is fully considered, it does not present much difficulty. The wife and children take derivative settlements from the husband if he is alive, but when the husband is dead the wife has ceased to be a wife, and becomes a widowed mother, and the settlements of the children are derived from her. I think the decision in *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (1) is right, and we are bound by it as to the settlement of the widow.

Then as to the children, I think we are bound, by the provision that a child under the age of sixteen shall take the settlement of the father or of the widowed mother as the case may be, to hold that they take the settlement of their mother.

Judgment for the appellants.

Solicitors for appellants: *Harris, Powell, & Goodall, for J. H. Square & Son, Kingsbridge.*

Solicitors for respondents: *Crowders & Vizard, for R. R. Rodd, Stonehouse.*

(1) 17 Q. B. D. 817.

P. B. H.

1887
March 2.

LEWIS, Appellant; FERMOR, Respondent.

Criminal Law—Cruelty to Animals—Operation for Purpose of improving Animal—12 & 13 Vict. c. 92, s. 2.

A person who, with reasonable care and skill, performs on an animal a painful operation, which is customary, and is performed bonâ fide for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of the offence of cruelly ill-treating, abusing, or torturing the animal, within the meaning of 12 & 13 Vict. c. 92, s. 2, even though the operation is in fact unnecessary and useless.

Case stated by justices.

At a court of summary jurisdiction at East Grinstead in Sussex, the appellant prosecuted the respondent under 12 & 13 Vict. c. 92, s. 2, for that the respondent did ill-treat, abuse, and torture five sows.

On behalf of the respondent it was admitted that he had performed the operation of spaying upon the sows in the manner in which that operation is usually performed; and on behalf of the appellant it was admitted that the operation was performed in a reasonably careful and skilful manner; and it was agreed that the only questions were, whether the operation caused pain to the sows; and if it did, whether such pain was necessary or justifiable.

In support of the prosecution it was contended that the operation caused much pain, and was unjustifiable because it was unnecessary, being performed, not for the benefit of the animals themselves, nor for the welfare or safety of the human race generally, but under the pretence only that it saved money to the owner of the sows operated upon, and that this pretence, though unjustifiable if true, had no foundation in fact.

For the prosecution five veterinary surgeons were called as witnesses. They described the operation, which consists in cutting out the uterus and ovaries, and removing them through an incision made in the flank of the sow for the purpose. It was stated that there were many parts of the country in which the operation was not practised. The witnesses said that the operation caused severe pain, and they all concurred in the opinion

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that it does not benefit the flesh of the animals, but is unnecessary and useless, because the flesh of a sow that is not spayed is deteriorated only during the periods of heat, which come on at regular intervals, and the sow need not be killed at such times, and not until they have passed off, and the flesh has resumed its normal condition.

No evidence was adduced on behalf of the respondent, but it was contended that the evidence adduced by the appellant did not shew that an offence had been committed within the meaning of the statute.

The justices were of opinion that the operation undoubtedly caused pain, but agreed with the contention of the respondent, and dismissed the information.

The question for the opinion of the Court was whether the evidence adduced by the appellant disclosed an offence under 12 & 13 Vict. c. 92, s. 2.

Waddy, Q.C. (*R. F. Colam*, with him), for the appellant. The respondent was shewn to have been guilty of an offence against s. 2 of 12 & 13 Vict. c. 92 (an Act for the more effectual prevention of cruelty to animals), by which if any person shall cruelly ill-treat, abuse, or torture any animal, he is to pay a penalty not exceeding 5*l*. The previous clause, for which this is substituted (5 & 6 Wm. 4, c. 59, s. 2), contained the word "wantonly," which is omitted from this Act. The omission shews an intention to exclude the defence relied on here, namely, that there was no cruelty, because the operation was performed for the purpose of making the animal more valuable to its owner. The absence of cruelty, in the sense of wantonness or malice, is immaterial. The decision in *Murphy* v. *Manning* (1), where it was held that cutting the combs of cocks was an offence against the statute, shews that the existence of a custom (which in the present case is not by any means universal) affords no excuse. In order to justify an operation so painful as this, it must be shewn, either that the operation is necessary, or that it is beneficial to the animal, in the sense that it produces physical benefit, or at least that it is beneficial to the owner in making the animal more valuable. All these

(1) 2 Ex. D. 307.

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statements of fact are distinctly negatived by the evidence in the present case.

The respondent did not appear.

DAY, J. This is a prosecution against John Fermor, a veterinary surgeon practising in Sussex, for performing the operation called "spaying" upon five sows. The prosecution was instituted under s. 2 of 12 & 13 Vict. c. 92 (An Act for the more effectual Prevention of Cruelty to Animals), which provides that if any person shall cruelly abuse, ill-treat, or torture any animal, he shall be liable to a penalty. It is contended on behalf of the prosecution that the defendant did cruelly ill-treat, abuse, and torture the sows in question. There can be no doubt that he did inflict pain, and it may be that he inflicted torture, but the question is whether he was guilty of cruelty within the meaning of the statute. The word "cruelly," like many other words, is of uncertain meaning, and is used with different meanings according to circumstances. In the present case we have to ascertain what it means in this section. It is clear that the section does not mean merely inflicting pain, for if that were so the word "cruelly" would be unnecessary. Much pain is often inflicted where the operation is necessary, as for instance in the case of cautery, which is practised on animals, and sometimes on human beings, often with beneficial results. That is torture, and in one sense it may be called cruel; but in my opinion, in this statute the word "cruelly" must refer to something done for no legitimate purpose. Cruelty must be something which cannot be justified, and which the person who practises it knows cannot be justified. It is true that the word "wantonly," which occurred in the earlier Act, is omitted from the Act now in force, but this cannot affect the meaning of the words which are used. Perhaps the word may have been omitted because it was considered somewhat vague. It seems to me that cruelty means the infliction of grievous pain without a legitimate object, either existing in truth or honestly believed in. The defendant here is a veterinary surgeon in Sussex, where it is customary to perform this operation. It is performed upon sows in order to increase their weight and development. It may be an error to suppose that it

has such an effect. I do not know how this may be, but that is the reason for the practice. It is believed to be beneficial to owners, and is extensively carried on, though not in all parts of the country. It is possible that one of the witnesses for the prosecution, who describes the operation as unnecessary and barbarous, but states that he himself performs about four thousand such operations a year, might be liable to a penalty; but that is not the case with the defendant, for he must be taken to have performed the operation for the benefit of the owner of the animals.

In my opinion the magistrates have come to a sound conclusion on the evidence before them, and the only conclusion which they could properly arrive at.

WILLS, J. I am of the same opinion.

No doubt an Act the object of which is to protect animals from cruelty should be fully administered, but on the other hand it is most important, in the interest of the public who are affected by it, that the Act should receive a fair and reasonable construction, so as not to bring within the criminal law people who act honestly and without any evil mind or motive. The difficulty is as to the meaning of the word "cruelly" in the statute. It cannot apply to cases of merely inflicting pain, for many useful and necessary operations cause great pain. I think there must be something of the moral element of cruelty to bring a case within the section. We were referred to *Murphy* v. *Manning* (1) as an authority in favour of the appellant; but there it was said that there are acts which are cruel in the extreme, in the sense of giving pain, but yet are lawful, because done for a lawful purpose. The question in the present case is whether the act was done for a lawful purpose; and not whether, in point of fact, in the opinion of the tribunal that has to adjudicate, the practice is a good one. For instance, if a man erroneously thinks that a horse has some malady that requires firing, and it turns out after the operation that he has mistaken the malady, and that the real disease from which the horse is suffering is one for which firing would be useless, and that therefore the great suffering which firing must entail has been, in one sense, purposelessly inflicted, can it be said that because

(1) 2 Ex. D. 307.

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WILLS, J.

he has made an honest mistake he is liable to conviction? If the appellant's contention be correct such a person ought to be convicted, for the operation would be neither necessary nor beneficial to the animal nor beneficial to the owner in making the animal more valuable. I think some meaning must be given to the words which will prevent such an application of the statute. In my opinion the proper view is that if the person who performs the operation entertains an honest belief that what is done will benefit the animal, he is not liable to be convicted. The belief may sometimes be erroneous, but we must be careful that we do not try to teach new, though perhaps improved, views on matters within the area of fair scientific discussion by means of the criminal law. In the present case I think there was ample ground to justify the magistrates in coming to the conclusion that, whether the notion as to the usefulness of the operation is right or not, it is one which may be bonâ fide entertained. When it has become so well known that a practice is wrong that every one must be taken to know it, then no doubt it would be impossible to establish the defence of a bonâ fide belief that it was reasonable; but where there is room for legitimate difference of opinion, the case is otherwise. The distinction was well illustrated by *Penny* v. *Hanson* (1), where it was held to be unnecessary to give evidence that the defendant did not believe in the efficacy of fortune-telling in order to justify a conviction for it, for that in the present day it is not possible to suppose that any one can really have such a belief. A century ago it might have been necessary to give evidence upon the point. There was no evidence here to shew that the question whether or not the operation is beneficial is removed from the category of legitimate doubt. The case would have been very different if instead of the present respondent one of the witnesses called for the prosecution had been made the defendant. A gentleman who admits that for payment he performs in the course of a year some thousands of operations which he believes to be at once extremely painful and perfectly useless could have no possible ground of complaint if he were prosecuted, convicted, and severely punished. It is said that the evidence of the appellant's witnesses as to the

(1) Ante, p. 478.

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inutility of the process was uncontradicted. To prove that it is useless, however, is but one step. It sufficiently appeared that there is a very wide-spread belief in its utility, and I feel bound to say that upon the mere question of opinion, the justices were under no obligation to accept or act upon the evidence of persons who admitted that they were in the daily habit of performing for pay an operation in their own judgment both useless and cruel. In the case of the respondent there was no such evidence against him, nor anything to shew that he did not honestly believe the operation to be beneficial.

For these reasons I am of opinion that the justices were right in refusing to convict.

Judgment for the respondent.

Solicitor for appellant: *A. Leslie.*

P. B. H.

[CROWN CASE RESERVED.]

March 5.

THE QUEEN *v.* GIBSON.

Criminal Law—Trial—Misreception of Evidence, Effect of.

Considered. LEJZOR TEPER *v.* THE QUEEN [1952] A.C. 480

In a criminal trial, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad; and this notwithstanding that there was other evidence before them properly admitted and sufficient to warrant a conviction.

CASE reserved by the chairman of quarter sessions held at Liverpool for the West Derby hundred of the county of Lancaster.

The prisoner was indicted, under 24 & 25 Vict. c. 100, for having unlawfully and maliciously wounded one Thomas Simpson with a stone on December 4, 1886.

From the facts stated in the case as having been proved in evidence it appeared that on the night of December 4, 1886, the prisoner had a quarrel with the prosecutor's son at a public-house in Wigan. The prisoner having left the public-house, the prosecutor, with his son and others, walked towards his own home, along a street in which was the prisoner's house. When opposite that house the prosecutor was struck on the head by a stone and

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severely injured. The prisoner was seen to enter his house immediately after the stone was thrown, and the prosecutor's son and a policeman broke open the door of the house and found only the prisoner and his father, who was drunk and asleep, inside. The stone came from the direction of the prisoner's house, and there was no other person except the prisoner on that side of the street when the stone was thrown. Shortly before the stone was thrown the prisoner had been seen by one of the witnesses for the prosecution to come up behind the prosecutor and those with him, and pass on the opposite side of the street.

The case also contained the following material statements:—

"The prosecutor stated, but not in answer to any specific question put to him, 'Immediately after I was struck by the said stone, a lady going past, pointing to prisoner's door, said, 'The person who threw the stone went in there.'"

"Save as above there was no direct evidence as to whether the prisoner did or could hear the words uttered by the woman.

"There was no evidence as to who the woman was, and she was not called as a witness.

"In summing-up I directed the jury's attention, among other matters, to the evidence as to the words uttered by the woman.

"After I had summed-up the case the jury retired to consider their verdict.

"After the jury retired the prisoner's counsel contended:—

"(1.) That the evidence as to the words uttered by the woman was not admissible, inasmuch as the words were not proved by the prosecution to have been uttered in the presence or hearing of the prisoner.

"(2.) That the evidence as to the words uttered by the woman should be withdrawn from the consideration of the jury.

"(3.) That the fact that counsel did not ask, immediately after the evidence as to the words uttered by the woman had been given, that the said evidence should be struck out, or raise any objection to the same before the jury retired, could not be allowed to prejudice the prisoner in a criminal case.

"I did not accede to the contentions of the prisoner's counsel on the ground that they were made too late; but I consented to state this case.

"There was ample evidence of identification against the prisoner to go to the jury other than the evidence as to the statement made by the woman.

"The prisoner was found guilty. I directed him to be let out on bail pending the decision of this honourable Court, but in default of bail I sentenced him to six months' imprisonment with hard labour.

"The question for the consideration of this Court is:—

"Does the fact that the evidence as to the statement made by the woman was left to the jury vitiate the verdict.

"If so, the conviction is to be quashed; otherwise to stand."

Shand, for the prosecution. It is admitted that evidence of the woman's statement could not, under the circumstances, be evidence against the prisoner, but the evidence was given voluntarily as an addition to an answer to a proper question, and no objection having been taken at the time by the prisoner's counsel, it was too late for him to take it after the chairman had summed-up and the jury had retired. The case finds that there was ample evidence of identification besides the woman's statement to go to the jury; and there is authority to shew that a conviction ought not to be quashed on the ground that some evidence has been improperly admitted, where there was other evidence properly admitted and sufficient to support the conviction: In *Rex* v. *Ball* (1) the question was whether, on an indictment for forgery of a bank note, evidence was admissible to prove that the prisoner had uttered other notes forged in the same manner. The majority of the judges held that it was admissible, and the report in Russ. & Ry., after stating that Chambre, J., dissented from that view, goes on to say: "Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any

(1) 1 Camp. 324; Russ. & Ry. 132.

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reasonable man, they thought that, as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received," &c. A note at the foot of the same report is to this effect: "In *Margaret Tinckler's Case* (1) all the judges thought the evidence of a witness of the name of Parsons ought not, in strictness, to have been received; but as the evidence was ample without it, the judges did not think themselves bound to stop the course of justice. See the facts of this case, 1 East, P. C. 354."

[He also referred the Court to *Reg.* v. *Fuidge* (2) as being in the prisoner's favour.]

No counsel appeared for the prisoner.

LORD COLERIDGE, C.J. I am of opinion that this conviction must be quashed. At the trial the statement of a passer-by as to where the prisoner had gone was received in evidence as tending to his identification. It is admitted that the statement was not made in the prisoner's hearing, and therefore could not legally be given in evidence against him. The prisoner was defended by counsel, who in the exercise of his discretion did not object to the admissibility of the evidence at the time it was given. It is immaterial to consider whether counsel exercised his discretion rightly or wrongly. The chairman of quarter sessions frankly states that in his summing-up he directed the jury's attention to the evidence with respect to the statement made by the person who was passing by. After the jury had retired the prisoner's counsel objected that the chairman ought not to have left that evidence to the jury. The chairman refused to withdraw it from their consideration. It is not necessary to express any opinion whether he could then have withdrawn it. The jury convicted the prisoner, and the question for this Court is whether or not a conviction so obtained can be allowed to stand. It is clear that a verdict so obtained in a civil case would not formerly have been allowed to stand, because until the passing of the Judicature Acts the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury,

(1) MSS., C. C. R. 1781. (2) L. & C. 390; 33 L. J. (M.C.) 74.

the party against whom it was given was entitled to a new trial, because the Courts said that they would not weigh evidence. Where, therefore, such evidence had gone to the jury a new trial was granted as a matter of right. Can it be contended that by the law as it stood at the time of the passing of the Judicature Acts there was any difference between civil and criminal trials with respect to the result of a finding of the jury arrived at upon evidence which was partly legal and partly illegal? The consequences in each case no doubt would be different. In civil cases a new trial was ordered; in criminal cases this for other reasons could not be done; but both in civil and in criminal cases the verdict would be vitiated by reason of the illegal evidence having been left to the jury. I think, therefore, upon principle the verdict of the jury in the present case cannot stand. The authorities referred to by counsel for the prosecution do not seem to warrant the inference drawn from them. In *R.* v. *Bull* (1) the prisoner was indicted for forgery of a bank-note, and evidence that he had uttered another note forged in the same manner, and that a number of other notes forged in the same manner and having different indorsements upon them in the prisoner's handwriting had been paid into a bank, was held admissible to prove his guilty knowledge. The report in 1 Camp., which I take to be the true and authentic report of the case, shews that the decision of the judges had reference entirely to the rule—now well-established—that acts done by a prisoner of the same character as the act charged in the indictment are, within reasonable limits, admissible in evidence in order to prove his guilty knowledge. The case turned wholly upon that point, and has no application to the present case. When the facts of *Margaret Tinckler's Case* (2) are looked at it is clear that it has no application whatever here. The question there was whether the declarations of a woman whom the prisoner was accused of having murdered were receivable in evidence. It was objected that they were not, on the grounds, first, that, the deceased woman was particeps criminis, in respect of one of the offences charged in the indictment, and that her statement, therefore, required corroboration, and had not been corroborated; and secondly, that the declarations were not made

(1) 1 Camp. 324; Russ. & Ry. 132. (2) 1 East, P. C. 354.

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Lord Coleridge, C.J.

when all hope of recovery was at an end, and therefore did not come within the rule as to dying declarations. The Court held, first, that, as the first count of the indictment charged the prisoner with the murder of the deceased, she was not charged with being particeps criminis in respect of that offence, and therefore that her declarations did not require corroboration; and secondly that, though her hopes of living revived after the declarations were made, her state of mind at the time she made them must be looked at, and that her state of mind at that time was such as to make the declarations admissible. Neither of the cases cited is of any authority in the case before us, though of great authority in respect of the questions decided in each of them. I am of opinion that the true principle which governs the present case is that it is the duty of the judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows. Here evidence which was at law inadmissible was allowed to go to the jury.

POLLOCK, B. I am of the same opinion. The question is an important one, because it is likely to arise in respect of documentary evidence in cases of indictments for bigamy where a certificate is objected to as not legally admissible in evidence. In the present case I am clearly of opinion that this Court has no power to say that the evidence of the identification of the prisoner was sufficient to warrant a conviction without the statement of the woman who was passing at the time the offence was committed. The result would follow that in every case where inadmissible evidence had been received it would become the office of the Court to decide in what way the jury ought to have acted upon the evidence before them which was legally admissible.

STEPHEN, J. I am of the same opinion, and I will only add a few words upon the cases which were cited by counsel for the Crown. As to *Rex* v. *Ball* (1) the last paragraph of the report in Russ. & Ry. was obviously written, not as part of the judgment of Chambre, J., but as observations made by the reporter; and

(1) 1 Camp. 324; Russ. & Ry. 132.

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those observations are unwarranted by any authority. The note as to *Margaret Tinckler's Case* (1) clearly was written under a complete misconception of the facts of that case. The note says that "all the judges thought the evidence of a witness of the name of Parsons ought not, in strictness, to have been received." But the statement of the facts in 1 East., P. C., shews that the judges thought that the evidence of Parkinson, the deceased woman, ought to have been received. They said nothing about the evidence being ample without it. They differed only upon the question whether or not Parkinson's declarations required corroboration, but they all thought them admissible. The note is obviously incorrect. I entirely agree with the judgment of my Lord.

MATHEW, J. I am of the same opinion. We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not. In either case it is the duty of the judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner. Here the chairman of quarter sessions did leave such evidence to the jury, and I am of opinion that their verdict ought not to stand.

WILLS, J. I am of the same opinion. I think no reasonable fault can be found with the prisoner's counsel for assuming that the chairman would give a proper direction to the jury, but I agree that the course taken by the counsel has no bearing upon the question before us. If a mistake had been made by counsel, that would not relieve the judge from the duty to see that proper evidence only was before the jury. It is sometimes said—erroneously as I think—that the judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence. The conviction must be quashed.

Conviction quashed.

Solicitor for the prosecution: *E. Holme Woodcock, Wigan.*

(1) 1 East, P. C. 354.

W. A.

1887
Feb. 3.

SMYTHE *v.* SMYTHE.

Practice—Compromise of Divorce Action—Power to make Agreement of Compromise an Order of Court in the Queen's Bench Division.

An action for judicial separation in the Divorce Division was compromised by the parties, and an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the High Court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the Queen's Bench Division for the purpose of enforcing payment:—

Held, that there was power to make the agreement an order of Court in the Queen's Bench Division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the Court to make the order had been rightly exercised.

Motion to set aside an order of November 16, 1885, by which an agreement of compromise of an action for judicial separation was made an order of the Queen's Bench Division.

In November, 1881, the petitioner brought an action in the Probate, Divorce and Admiralty Division for a judicial separation on the ground of cruelty, and in his answer the respondent brought counter-charges of cruelty against the petitioner. The action was ultimately compromised before trial, and an agreement of arrangement was, on July 15, 1882, signed in Court by the petitioner and respondent, which provided that a deed of separation with the usual covenants and containing certain specified stipulations should be executed by the parties, all questions as to the meaning of the terms of compromise or the form of the deed to be settled by counsel. After certain provisions as to the custody of the children and the wife's allowance, which are not material for the purposes of this report, the agreement proceeded as follows:—"Cause to stand over for execution of the deed, and these proceedings to be withdrawn by consent. This agreement may be made a rule of the High Court. The respondent to pay the petitioner's taxed costs."

Difficulties arose about the terms of the deed, which was settled by counsel in April, 1883, but was not executed by the parties until January, 1886, when a deed was executed which differed somewhat from that originally settled. On November 14,

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1885, the petitioner's solicitor obtained an ex parte order from Huddleston, B., at chambers, making the agreement of compromise an order of the Queen's Bench Division, and the agreement was accordingly duly made an order of that division on November 16, 1887. The respondent having refused to pay the taxed costs of the petitioner's solicitor on the ground that the deed actually executed was not such a deed as was provided for by the agreement, a writ of fieri facias was on January 5, 1887, issued against him by the petitioner's solicitor for 187*l.* 10*s.* 4*d.*, the amount of his taxed costs. The respondent paid the money under protest, and now moved to set aside the order of November 16, 1885, and the writ of fieri facias issued thereon, and all proceedings thereunder. After the agreement of compromise had been signed, the petitioner took the petition off the file of the Court, and subsequently refused to restore it.

Crump, Q.C., and *A. T. Lawrence*, for the respondent. There is no power to make the terms of the compromise a rule of Court. The first section of 9 Wm. 3, c. 15, and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17, apply only to a submission to arbitration, which this is not. The order should be rescinded and the fi. fa. set aside. [They referred to Rules of Supreme Court, 1883, Order XLI., r. 5; Order XLII., rr. 1, 17, 23; Order LXVIII., r. 1; *Hampden* v. *Wallis.* (1)]

Horne Payne, Q.C., and *Beddall*, for the petitioner. This is a submission to arbitration. Even if it is not, the Court has power to enforce the compromise of a divorce action. If the remedy now sought fails, the only remedy is by action in the Chancery Division. [They cited *Pryer* v. *Gribble* (2); *Eden* v. *Naish* (3); *In re Gaudet Frères* (4); *Gilbert* v. *Endean* (5); *Hart* v. *Hart* (6); *Duke of Buccleuch* v. *Metropolitan Board of Works* (7); *Fussell* v. *Silcox* (8); *Dawson* v. *Newsome.* (9)]

Crump, Q.C., in reply.

(1) 26 Ch. D. 746.
(2) Law Rep. 10 Ch. 534.
(3) 7 Ch. D. 781.
(4) 12 Ch. D. 882.
(5) 9 Ch. D. 259.
(6) 18 Ch. D. 670.
(7) Law Rep. 5 Ex. 230, per Blackburn, J.
(8) 5 Taunt. 628.
(9) 2 Giff. 272.

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LORD COLERIDGE, C.J. I am of opinion that the order must be supported. Had the action been in any other division of the Court than the Probate, Admiralty, and Divorce Division, I should have entertained no doubt at all as to the power to make this order; but any doubts which I at first entertained have been entirely dispelled by my Brother Hannen, and I concur in the judgment which he is about to pronounce.

SIR J. HANNEN. I think that this motion must be dismissed. There is no doubt that for a long time the practice has existed in the courts generally of allowing agreements of compromise to be entered into between the parties, and that such agreements frequently contain clauses providing that the agreement may be made a rule of Court, or that a judge's order may be obtained, if necessary; the principle which actuates the Courts in allowing such arrangements being that all the parties are sui juris, and are capable of making such an arrangement in their own interests. As a fact, this practice prevailed for some time in the Divorce Court; but for reasons which were then doubtless all sufficient an alteration was made by the late Sir Cresswell Cresswell, who refused to allow the compromise of divorce suits to be made as of course a rule of that Court. The effect of this was that in order to enforce the compromise the parties were obliged to take proceedings in one of the other Courts either by an action on the agreement or by a suit for specific performance. But the necessity for this circuitous procedure has been altered by the Judicature Act, and all the judges are now judges of one Court, although certain specified business is for convenience' sake assigned to particular Divisions. I have no doubt that I could have made this agreement an order of Court; but this was not done, and the petitioner brought it before another judge of the High Court, who was asked to exercise a power which is constantly exercised in the Long Vacation by the judge at chambers, and I have no doubt that my Brother Huddleston had jurisdiction to make this order in the way in which it was done.

Then is there any reason why the order should be set aside? The only points in difference between the parties were whether or not a proper deed had been executed in conformity with the

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agreement and whether the husband had become liable to pay certain costs. As to the deed, the difficulty solved itself; the question stood over until an agreement had been come to as to its terms, and a deed was ultimately accepted as the deed to be executed by the parties, and it has been executed. That clause of the agreement is therefore at an end, and the only matter remaining is whether the agreement by the respondent to pay the petitioner's costs should be enforced. I do not think that the jurisdiction of my Brother Huddleston should be restrained, or that we should interfere in the matter when it is reduced to a question of enforcing the agreement to pay costs by an order of Court. I agree with the suggestion that the peculiar matters which arise in divorce actions should be left to the discretion of the parties; and in this very case I refused in the first instance to make the agreement an order of Court, though I have no doubt that I had the power to do so. But this agreement being now reduced to an agreement to pay a sum of money, I think it one which, in the exercise of my discretion, I should make an order of Court; though were it sought to enforce the provisions for the custody of the children, I should abstain from enforcing it in a summary way.

GROVE, J. I am of the same opinion as to the result, but I have very grave doubt whether an order of this nature should be made ex parte. It seems to me that such a course involves considerable danger in a case where a very long time has elapsed, and the application is made to a judge of a division other than that in which the action was tried.

Motion dismissed.

Solicitor for petitioner: *Waples Canwarden.*
Solicitors for respondent: *Mackeson, Taylor & Arnould.*

W. J. B.

1887
March 8.

ARCH *v.* BENTINCK.

Practice—Parliament—Election Petition—Trial of—Change of Venue—"Special Circumstances"—31 & 32 Vict. c. 125, s. 11, sub-s. 11.

Where the allegations of fact in a parliamentary election petition are not in dispute, but are specifically admitted by the respondent so as to render it unnecessary at the trial to call witnesses from the district in which the election took place, the Court may order the petition to be tried in London on the ground that "special circumstances" exist within the meaning of s. 11, sub-s. 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which render it desirable that the petition should be tried elsewhere than in the county or division where the election took place.

By s. 11, sub-s. 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), it is provided that the trial of an election petition in the case of a petition relating to a county election shall take place in the county: "provided always, that if it shall appear to the Court that special circumstances exist which render it desirable that the petition should be tried elsewhere than in the county, it shall be lawful for the Court to appoint such other place for the trial as shall appear most convenient."

By s. 9, sub-s. 1, of the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), counties returning more than one member are to be divided into the same number of divisions as the number of members; and by sub-s. 3, "the law relating to parliamentary elections shall apply to each such division as if it were a separate county."

A petition was presented against the respondent, the sitting member for the North-West Division of the county of Norfolk, the only charge in it being one of an illegal practice alleged to have been committed after the election. The act done was not denied by the respondent, and was formally admitted by him for the purposes of the trial of the petition; but it was contended on his behalf that it did not constitute an illegal practice within the meaning of the Corrupt Practices Act, 1883. It was admitted that at the trial it would probably be unnecessary to call any witness for the petitioner, and that the respondent would probably be the only witness on his own behalf; and that if the Court had power to change the venue on the ground of the exist-

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ence of "special circumstances" within the meaning of the Act of 1868, the trial could be held with greater convenience to all parties in London than in North-West Norfolk.

Jeune, for the respondent, moved that the venue be changed to London.

R. S. Wright, for the petitioner.

THE COURT (Day and Wills, JJ.) held that "special circumstances" existed within the meaning of the Act which rendered it desirable that the petition should be tried in London, and made the order as asked.

Solicitors for petitioner: *Wilkins, Blyth, & Co., for Emery, Fakenham.*

Solicitors for respondent: *Baileys, Shaw, & Gillett.*

W. J. B.

[IN THE COURT OF APPEAL.]

Feb. 28.

THE GOVERNOR, DEPUTY-GOVERNOR, ASSISTANTS, AND GUARDIANS OF THE POOR OF THE CITY OF BRISTOL *v.* THE MAYOR ALDERMEN, AND BURGESSES OF THE CITY AND COUNTY OF BRISTOL (ACTING AS THE URBAN SANITARY AUTHORITY FOR THE CITY AND COUNTY).

Poor-rate—Land liable to Assessment taken for Improvements—Deficiency in Assessments—Liability of Promoters to make good—Completion of Works—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 2, 133.

By the Lands Clauses Consolidation Act, 1845, s. 133, the promoters of undertakings who become possessed under statutory authority of lands liable to be assessed to the poor-rate, are liable to make good the deficiency caused thereby "until the works shall be completed and assessed to the poor-rate."

An urban sanitary authority, acting under statutory authority, took for the purposes of improvements lands situate in a number of parishes and liable to be assessed to the poor-rate. In some cases all the land so taken was used in the construction of the roadways of new streets; but in some cases more land was taken than was required for that purpose, so that the sanitary authority became possessed of surplus land which was vacant, unoccupied, and unassessed. Such land was to be disposed of either by sale in fee simple or by the creation of rent-charges which were to be sold within a specified time which had not expired when the rating authority brought an action to recover from the sanitary authority the amount of the deficiency in the assessment to the poor-rate caused by the lands having been taken:—

Held, that the works were completed within the Lands Clauses Consolidation Act, 1845, s. 133, so as to relieve the undertakers from the liability to make

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good the deficiency so caused, when the streets were fully made, and such of the lands taken as might be liable to assessment had become assessable.

Held, also, that the deficiency was to be computed from time to time by comparing the assessed value at the time of the special Act of the lands taken with the assessed value at the time of computation of such of the lands taken as might have again become assessable.

The authority to put in force the compulsory powers of the Lands Clauses Consolidation Acts was conferred by a provisional order confirmed by a statute which described in one schedule, but under headings separately numbered, the several improvement schemes promoted by the sanitary authority :—

Held, that each scheme described in the schedule constituted a separate undertaking, and that the deficiency in the assessment ought to be calculated on each separate undertaking within the rating area affected by it.

SPECIAL CASE stated in an action brought by the plaintiffs, who were incorporated by 3 Geo. 4, c. xxiv., and thereby appointed to be the guardians of the poor of the city of Bristol, to recover from the defendants who are, pursuant to the Public Health Act, 1875, the urban sanitary authority for the city and county of Bristol, alleged deficiencies in poor-rates in respect of several assessments of properties taken by the defendants for street improvements in certain parishes within the limits of the ancient city of Bristol.

By the Local Government Board's Provisional Orders Confirmation (Bristol, &c.) Act, 1876 (39 & 40 Vict. c. xcvii.), a provisional order, made under the provisions of the Public Health Act, 1875, and relating to the city of Bristol, was confirmed. That order empowered the defendants, as the urban sanitary authority of Bristol, to put in force with reference to the lands and premises described in the schedule thereto, and for the purpose of widening and otherwise improving certain streets and roads, the powers of the Lands Clauses Consolidation Acts with respect to the purchase or taking of lands otherwise than by agreement. The order and Act contained in one schedule fourteen different improvement schemes, numbered 1 to 14, but four only were material to this case.

The defendants, acting under the powers so conferred, took certain lands situated in various parishes and liable to be assessed to the poor-rate. In some cases all the land so taken was used in the construction of the roadway of the new street, while in other cases more land had been taken than was required for that

purpose, land having been taken which would border on the new street and thus improve the neighbourhood as a site for new buildings. The new streets had been thrown open to the public at the time when this action was brought, some of the surplus lands had been sold and rebuilt upon and re-assessed, but some of such lands were still in the hands of the defendants, vacant, unoccupied and unassessed. In those instances in which lands had been sold and rebuilt upon and re-assessed the value upon which they were so assessed to the poor-rate was in excess of the amount at which they had formerly been assessed. In some cases the improvement scheme was contained within one parish, while in other cases one scheme affected two or more parishes.

It was admitted during the argument that the defendants were empowered by the operation of several local Acts to sell the surplus land absolutely or at reserved fee farm rents, and that they were to sell the lands and rent-charges within a period that had not yet expired. A deficiency having arisen in the assessments to the poor-rate by reason of the lands having been so taken, the plaintiffs contended that the defendants were liable to pay to them the deficiency, if any, in respect of each property which had been separately assessed, irrespective of any increase in value arising upon other properties which had been taken and subsequently re-assessed, and that if this contention could not be sustained the deficiency must be ascertained by dealing with each of the nineteen parishes within the limits of the ancient city of Bristol separately, and that no set-off of increased value in one parish could be made against a deficiency arising in another. The plaintiffs also contended that the liability of the defendants to make good the deficiency on the several assessments respectively continued in each case until the new or improved streets were completed, in the sense that buildings in contiguity or approximate contiguity had been erected on the adjoining land and assessed to the poor-rate, or (in the alternative) until each separate item of the former assessments had been re-assessed to the poor-rate, or at the least until the lands not dedicated to public traffic by virtue of the scheme had been disposed of by the defendants and re-assessed.

The defendants contended that their liability to make good any deficiency must be ascertained by taking the area of the

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ancient city of Bristol as one rating area with respect to each separate undertaking authorized to be executed therein and not by dealing with each parish in that area separately, and that the correct way of ascertaining the deficiency for which they were liable was to add up the total rateable values of the properties taken at the time the defendants obtained possession thereof respectively and to deduct all the values of the properties re-assessed as and when they became re-assessable, and for any deficiencies thus appearing from time to time they admitted liability. But in all cases they contended that when the streets and improvements authorized to be executed by them were completed their liability absolutely ceased, and that such completion was effected when the new and widened roadways and footways were formed and open for public use. Further, that holding vacant lands as surplus property not required to be thrown into the roads or footways of the widened and improved streets or roadways, did not prevent the "works" authorized being completed within the meaning of s. 133 of the Lands Clauses Consolidation Act, 1845, as applied to the present case. They further contended that in cases where the whole of a rateable property was devoted to the site of the road or footways of a street their liability ceased as to that property on the opening of the street to the public as a highway. They also contended that they were entitled to the benefit of all re-assessments to be taken into account against the deficiency.

The questions for the opinion of the Court were—

1. At what period does the liability of the defendants to make good deficiencies in the rates terminate?
2. Whether the liability must not be considered and dealt with in respect of each undertaking, treating the entire ancient city of Bristol as one area.
3. Whether the mode of calculating the deficiency contended for by the plaintiffs or that alleged by the defendants is correct. (1)

(1) That part of the special case which raised the question whether the whole of the ancient city of Bristol ought to be treated as one rating area, or whether each of the nineteen parishes in it constituted a separate rating area, is omitted as depending on the construction of two local Acts, 3 Geo. 4, c. xxiv., and 1 Vict. c. lxxxvi.

Dec. 14. *Pitt Lewis, Q.C.*, and *Wightman Wood*, for the plaintiffs. The plaintiffs are entitled to call on the defendants to make up the deficiency caused by their having taken lands for their undertakings until such time as "the works shall be completed and assessed," as provided by the Lands Clauses Consolidation Act, 1845, s. 133. (1) The liability of the defendants is not at an end when the streets are thrown open, they are liable until all the surplus lands have been dealt with by sale or by the creation of ground rents, so that the land becomes capable of being rated. *Quinton* v. *Corporation of Bristol* (2) decided that the principles which apply to the taking of land by railway companies do not apply to land taken by local authorities, for these latter are not limited as are the former bodies, but are entitled to take all the property scheduled by them, so that it follows that the works are not completed within the meaning of the Act, until all the land which has been taken has been disposed of either by using it for the construction of the new street, or, if it is surplus land, by reselling it so that it can be assessed. The power to sell is in fact an integral part of the undertaking contemplated by the legislature, for it relieves the ratepayers of a part of the burden cast on them by the improvements. The distinction between such cases as these and railways, and the legal consequences of that distinction, are pointed out in *Galloway* v. *Corporation of London*. (3) The surplus lands in the hands of the defendants cannot be rated: *Corporation of London* v. *St. Andrew's, Holborn* (4); it is therefore reasonable that the defendants should make good the deficiency in the assessment.

The deficiency ought to be calculated in respect of each pro-

(1) 8 Vict. c. 18, s. 133: "If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's-rate, they shall from time to time until the works shall be completed and assessed to such land tax or poor's-rate be liable to make good the deficiency in the several assessments for land tax and poor's-rate by reason of such lands having been taken or used for the purpose of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon were valued or rated at the time of the passing of the special Act. . . ."

(2) Law Rep. 17 Eq. 524.

(3) Law Rep. 1 H. L. 34.

(4) Law Rep. 2 C. P. 574.

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perty separately assessed, or at least in each separate parish, for the words "in the parish" must be read in after the words "and assessed:" *East London Ry. Co.* v. *Whitechurch* (1), and each undertaking scheduled in the confirming Act, 39 & 40 Vict. c. xcvii., is a separate undertaking.

Philbrick, Q.C., and *Wall*, for the defendants. The liability of the defendants ceases when the works are completed. The works are completed when the street is made and the roadway open to the public. The fact that the defendants hold surplus land does not prevent the works from being completed. The time contemplated by s. 133 of the Act, is the time at which the constructive works which the promoters can undertake are complete. *Stratton* v. *Metropolitan Board of Works* (2) supports this view, as the observation of Lush, J., during the argument shews, though in that case the statute under discussion fixed a period, and contained a proviso as to a certificate which is not found here. The Act presupposes that the works when completed will constitute a subject of assessment, as in the case of railways, whereas the land thrown into the roadway can never be assessed, and the vacant land is not the subject of assessment. Even if the view suggested in *Wheeler* v. *Metropolitan Board of Works* (3), that the section cannot apply at all unless the lands taken can be capable of beneficial occupation, be not adopted, still the words "and assessed" in s. 133 must be rejected, for there will never be a property liable to be assessed in lieu of that destroyed, but the defendants would, if the works are held not to be completed until they are also assessed, be subject to a perpetual liability. The judgment of Lord Cairns in *East London Ry. Co.* v. *Whitechurch* (4) is important on the point as to the mode in which the assessment is to be taken, and it establishes that the assessment must be on the rating area as a whole, and not on the several properties previously separately assessed.

For the purposes of the Act there is but one undertaking. That section points to anything taken for improvements within the rating area, the different headings in the schedule to the confirming Act (39 & 40 Vict. c. xcvii.) refer to the different

(1) Law Rep. 7 H. L. 81.
(2) Law Rep. 10 C. P. 76.
(3) Law Rep. 4 Ex. 303.
(4) Law Rep. 7 H. L. 81, at p. 86.

improvement schemes, all of which, however, constitute but one undertaking within the meaning of the Lands Clauses Consolidation Act, 1845.

Pitt Lewis, Q.C., in reply.

Cur. adv. vult.

Dec. 21. WILLS, J. This special case raises an important question as to the extent of time during which the deficiency in the assessments to the poor-rates within the ancient city of Bristol ought to be made good by the promoters of certain improvement schemes who have interfered with property which was formerly assessed to the poor-rate.

The first question which arises is at what period does the liability of the urban sanitary authority to make good this deficiency come to an end. This depends on s. 133 of the Lands Clauses Consolidation Act, 1845, and the difficulty which has to be dealt with arises from an attempt to save complexity by adapting words which were applicable to one state of things, to a state of things to which they are not easily applicable.

In this case the works undertaken by the defendants may be divided into two classes, according to the nature of the works which have been undertaken. The first class consists of those cases in which a new street has been made, land being taken for that purpose, but no more being taken than was actually required for the street or the street improvement. The other class comprises those cases in which more land was taken than was necessary for the construction of the street, so that a speculation in land on the part of the urban sanitary authority was entered into, as was in fact authorized by the Acts of Parliament in pursuance of which these works were undertaken. Two cases were discussed during the argument, viz., *Galloway* v. *Corporation of London* (1) and *Quinton* v. *Corporation of Bristol* (2), and those cases make it clear beyond controversy that under Acts such as those we have to construe, and for the purposes specified in this case, it is not possible to treat the power given to take land as a power merely ancillary to the undertaking viewed as a whole, as is the case in the construction of a railway; but that it must be regarded as an

(1) Law Rep. 1 H. L. 34. (2) Law Rep. 17 Eq. 524.

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WILLS, J.

integral part of the whole scheme, so that in such a case as this the buying of the additional land is part of the undertaking itself, and the authority to execute the works is not limited as it is in the case of a railway company, since the legislature has authorized the local authority not only to purchase land, but in fact to speculate in land, and all matters necessarily incidental to this object are as much within the scope of the undertaking as is the actual construction of the street itself, and this, as it seems to me, has an important bearing on the question of the time when the works are to be considered as completed. The expression "the works" is thus defined in s. 2, "the expression 'the works,' or 'the undertaking,' shall mean the works or undertaking of whatever nature which shall by the special Act be authorized to be executed," and this definition points to the carrying out of the scheme of purchasing land for the purpose of re-sale, and to the re-sale of surplus land as being as much part of the undertaking as the construction of the street itself.

When, then, is the undertaking complete? In ordinary cases land which is not required for the undertaking is sold, and the undertaking is complete when the last bit of land is sold. But in this case there is a further complication, for power is given, as was conceded on both sides, to create ground rents, and to sell those instead of selling the land itself. I am of opinion that we must treat the creation of these ground rents as being equivalent to a sale of the land, for the sale of these ground rents is but a convenient machinery by which the property may in fact be disposed of, so that the period which may elapse between the creation of the ground rents and the actual sale of these rents is immaterial.

The works, therefore, are not completed until the last piece of land has been dealt with, either by sale or by the creation of ground rents. The words in s. 133, "until the works shall be completed," are immediately followed by "and assessed to such land tax or poor's-rate." Now there must, in both classes of undertakings, be land in the hands of the local authority which is incapable of being rated. In those cases in which there is no surplus land, the land which actually forms the street is not capable of being rated, while in those cases in which land is taken

for the purpose of re-sale, that land is not liable to be rated while in the hands of the defendants, for, as was established in the case of *Corporation of London* v. *St. Andrew's, Holborn* (1), it was not intended that such land in the hands of the local authority which promotes such undertakings as these should be rated, but only that the local authority should be liable to make good the deficiency so caused. I am of opinion, therefore, that the phrase "until the works shall be . . . assessed," is in such a case as this insensible, and that the words "and assessed to . . . such poor's-rate," must be rejected, for they cannot be applied to the circumstances and the facts which arise from the operation of the statute. It is not possible to satisfy them by extending the period of time, for in such a case as this they can never be satisfied. This view is supported by the case of *Stratton* v. *Metropolitan Board of Works* (2), for in that case the remarks of Bramwell, B., in *Wheeler* v. *Metropolitan Board of Works* (3), were considered and dealt with. The learned Baron had expressed some doubt whether the view then adopted was the correct one, but those doubts were in the later case held to be extra-judicial, and in *Stratton* v. *Metropolitan Board of Works* (2) the Court deliberately rejected the view so suggested.

The works are therefore completed within s. 133 of the Lands Clauses Consolidation Act, 1845, when the street is constructed and completed, if that is all that is contemplated by the undertaking, and if that is all that has to be done; but if the scope of the undertaking is larger, and if land is taken for the purpose of re-sale, then the works are completed when there has been a sale of the fee simple of the last piece of land, or when the last ground rent has been created, whichever of these events shall last happen.

The next question is whether on the true construction of the Act which confirmed the provisional order, there were fourteen separate undertakings, or whether there was only one undertaking. The provisional order which is set out in the schedule to that Act empowers the urban sanitary authority for the city and county of Bristol to put in force the powers of the Lands

(1) Law Rep. 2 C. P. 574. (2) Law Rep. 10 C. P. 76.
(3) Law Rep. 4 Ex. 303.

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Clauses Consolidation Acts with reference to the lands and premises described in the schedule thereto, and in the schedule a number of undertakings are specified, each undertaking being numbered separately as "Undertaking No. I., Undertaking No. II.," and so on, each undertaking being fully described under its own distinct heading. Now this word "undertaking" is a word used in all statutes of this nature relating to schemes to which the Lands Clauses Acts apply, and I am of opinion that each undertaking must be considered as separate from the other undertakings as if there had been fourteen separate Acts, one for each undertaking.

It is necessary now to consider in what mode the assessment is to be made with respect to which the deficiency which has to be made good is to be calculated. Is the assessment to be on the rating area, whatever that may be, taken as a whole, or is it to be made on the individual charges in respect of separate properties previously assessed? I am of opinion that the meaning of the word "assessment" in this connection means the assessment taken as a whole within each rating area, whatever that may be, through which the undertaking passes. It is well known that this legislation dealt primarily with undertakings which were likely to pass through a number of parishes on their way from one end to the other end, as for instance would be the case with a railway, and it is not difficult to see that the several assessments must mean the assessment in each parish or rating district through which the works pass, taken by itself.

[The learned judge then dealt with the question whether the whole of the ancient city of Bristol was to be considered as forming one rating area, or whether each of the nineteen separate parishes comprised in it was to be considered as a distinct rateable area, and, after examining the local Acts of 3 Geo. 4, c. xxiv., and 1 Vict. c. lxxxvi., he came to the conclusion that each of the separate parishes constituted a distinct rating area, and that the rates must be regarded as nineteen different rates for each of the separate parishes respectively.]

GRANTHAM, J. As far as the result is concerned I agree with Wills, J., but I am unable to agree with him as to the last point

raised and decided by him. That is, I cannot come to the same conclusion on the question whether this rate is a separate parochial rate for each parish or whether it is one rate for the whole of the ancient city of Bristol. I am of opinion that the rate made is one rate for the whole city, but I think that will not alter the effect of the judgment, because it seems to me the deficiency can only be arrived at by taking each undertaking by itself, and that the deficiency on each undertaking must be considered, and that this being so it will make no difference whether it is taken parochially or for the whole city.

[The learned judge then examined the provisions of the two local Acts already referred to, and continued:—] This being the view I take, I was under the impression from the position of the various undertakings that it was admitted that the deficiency for each undertaking having to be arrived at, it made no difference whether the rate was a parochial rate or one for the whole city. With this exception I agree with the whole of the judgment of Wills, J.

WILLS, J. The result is that the first question as to the period at which the liability of the defendants terminates is answered thus, that it terminates on the completion of the street, or the sale of the last piece of land in fee simple, or the creation of the last of the ground rents, whichever shall last happen, and for the purpose of applying this answer each of the fourteen undertakings scheduled in the local Act of 1876 is to be considered as a separate undertaking. If no ground rents are created then part of this answer does not apply. The next question is a compound one, and that can only be partly answered, as the Court is divided in opinion as to part of it, that is, the part as to there being one or fourteen undertakings is answered, but the part as to the rating area is not answered.

Judgment accordingly.

R. B. R.

The defendants appealed.

Feb. 28. *Philbrick, Q.C.*, and *Wall*, for the defendants. The liability of the defendants to make good the deficiency ceases

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when the works, that is, the streets, are completed. Even if this is not so, the whole of the improvements which they are authorized to make form one undertaking, and any excess of rateable value caused by the completion of one part will reduce the deficiency on the whole. When this excess balances the loss the defendants' liability ceases, even though some works remain to be done. The terminus of the liability of the defendants was therefore incorrectly determined by the Court below.

Pitt Lewis, Q.C., and *Wightman Wood*, for the plaintiffs. By the interpretation clause (s. 2) of the statute "works" and "undertaking" are equivalent terms, and the undertaking is the entirety of that which the promoters, by the terms of the special Act, are required to do. When they have finished what they are empowered to do, and such part of what they have done as is capable of assessment is assessed their liability ceases. They cited, in addition to the cases cited below, *Bushell* v. *Buckett* (1); *R.* v. *St. Michael's, Norwich* (2); *R.* v. *Wallingford Union.* (3)

Philbrick, Q.C., in reply.

LORD ESHER, M.R. (after dealing with other points). I now come to the question whether this is to be taken as one undertaking or several. This is a matter of fact to be determined, not so much by the words used in any given document, as from the nature of the thing that is undertaken. If the things which are to be done are in their nature distinct, they cannot be made one undertaking merely by putting them in the same petition or Order in Council. Looking at the things to be done here, they seem to me, as far as I can judge, to be in their nature distinct, and I think they were quite rightly treated in the Order in Council as separate undertakings, and therefore no credit can be taken in one undertaking for a surplus arising on another and separate undertaking.

Now comes the question as to the period of time at which, though there may be a deficiency, it is no longer to be made good. That turns on the true construction of s. 133 of the Lands Clauses Consolidation Act, 1845, as incorporated in the local

(1) 2 C. B. 111. (2) 6 T. R. 536.
(3) 10 A. & E. 259.

Act. I say that because I adopt the reasoning in *Stratton* v. *Metropolitan Board of Works* (1), founded on the view that s. 133 must not be read by itself, but in each case as and when it is introduced into the local Act. The section was drawn with relation to such undertakings as railways and canals, which, when finished, become rateable properties, and, as not unfrequently happens in such cases, there is difficulty in applying it to new circumstances which have arisen since it was passed. However, we are directed to apply it, and must accordingly apply it, to cases which have now become common where a large portion of the land taken for the undertaking passes into new streets and the like, and can never become again a rateable property. In this view of the case, I think it is necessary to read the expression "the works" as meaning not merely the structural works, but the undertaking which is to be carried out. Now, here the promoters have undertaken more than the duty of making streets, for they take more land than is wanted for the actual streets. It is not denied that they have undertaken when they have finished the streets to sell that surplus land, and I consider that this sale of surplus land is part of the "works," using that term in an enlarged sense, that they have to do. Now, a part of their works can never be assessed, and we must therefore, in accordance with *Stratton* v. *Metropolitan Board of Works* (1), read the section as though it said "until the works are completed, and such part of them as become assessable property are assessed." The section is directed to ascertain a limit of time, which, in many cases, it would not do unless it is read in this manner. Applying that to the present case, the limit of time will be when the structural parts are finished and the surplus land is all sold and has all become assessable. I incline to agree that as each part of the land is disposed of and becomes assessable, that will from time to time lessen the deficiency in respect of each separate undertaking. The deficiency at any given period would be the whole deficiency created by the taking of the land less what is so obtained, and when these balance, even although there is land still remaining in hand, there is no longer a deficiency, and the liability will cease. If when the street is finished and all the

(1) Law Rep. 10 C. P. 76.

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surplus land assessed there should still remain a deficiency, the liability of the promoters is nevertheless ended, because this is not an indemnity, but only a payment of a deficiency for a certain time.

Now what is the result with regard to this appeal? A course was taken with regard to the drawing up of this judgment which, I think, is new, and which is undesirable, that is to say, the two learned judges in the Divisional Court have differed in opinion upon a point. One of them has not withdrawn his judgment, and the judgment of the Court is not drawn up either way. As no judgment was drawn up both sides were obliged to come here to get a judgment on the point, and as we are neither affirming nor overruling a judgment of a Divisional Court, there will be no costs of this appeal.

My Brother Bowen agrees in the results at which I have arrived as to each of the points.

FRY, L.J. (after dealing with other matters). The next question that arises is, Whether all these several streets or each street or several lines of streets are to be considered as a separate undertaking. I confess that I have had some difficulty as to the true answer to that inquiry, but I think that the scope and intent of the provisional order, and of the legislature in confirming that provisional order, were to treat each of these several streets or works or undertakings which is defined as an undertaking in the schedule to the provisional order as being distinct from the others. I think that convenience is manifestly in favour of that view, and that to consider the whole of these several streets in different parts of the city of Bristol, which may have no connection one with the other, as parts of one common undertaking, would be at variance with the language adopted by the legislature, and would be highly inconvenient. I agree, therefore, with the view which the Master of the Rolls has expressed upon the point.

The next point is this: When does the liability to pay the deficiency determine? That is a question which is embarrassed by this circumstance, that the legislature has been pleased to import into the statutes which regulate this undertaking a

section which was drawn in regard to undertakings of a different description. The primary object of an undertaking to which it was intended to apply the Lands Clauses Consolidation Act was to create a certain physical structure which was in its nature liable to assessment—such things as a railway, works of a railway, terminus of a railway or approaches to a railway. In the present case that provision has been applied to an undertaking the main object of which is to produce a structure which is not assessable to the rates. Therefore there arises a difficulty in applying language fitted to one case to the other. In the present case the works are primarily the construction of the street, widening the street, and improving the street. The buildings at the side of the street are not works which the undertakers are to do, although they are empowered to sell the land upon which those structures may be raised. It is said, therefore, that the works to be completed must be the mere making of the footway and the roadway. It appears to me that is primarily what one would expect to be the meaning of the word "works," but then we come to this, that the legislature, in contemplating works, are contemplating something that can be assessed. Such works as these never can be assessed. If, therefore, we are driven to the narrow and primary construction of the word "works," the result is that the terminus of liability that the legislature has pointed out is removed to an indefinite distance: and whereas the legislature is intending to say when a thing shall cease, that construction says it never shall cease. We are therefore driven, it seems to me, by the very exigency of the statute to put some secondary meaning upon the word "works." The best secondary meaning we can put upon that expression in a case like this is that the completion of the works means the doing the structural alteration which the promoters are bound to do and the selling the land they take as incidental to their works, which will have the effect of bringing that land back again to its liability. I come to the conclusion therefore that that is the true terminus of the liability.

Now there remains the question, which certainly is again not a very easy one, in what mode is the deficiency to be ascertained? It is said, on the one hand, you are to take every single tenement or item on the rate-book, and that as long as any deficiency

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remains in respect of that, there is a deficiency for which the promoters are liable: it is said, although they may take one hundred items and ninety-nine of those may be brought back into rateability, so that the rates have been largely increased on the hundred, if there is a deficiency on the one they are liable to make that good. I am bound to say that does not appear to me to be the meaning of the statute. As I have already said, I think the deficiency is the amount by which the common fund is less than it otherwise would have been; and, in my opinion, the true view is this, that so long as the liability to the deficiency remains you are to inquire whether there is any deficiency, because I beg leave to observe that, in my judgment, there may be a liability to a deficiency existing, although the deficiency itself does not exist. That must be determined from half-year to half-year, or whatever may be the period of the rate. You must take on one side the assessed value at the time of the passing the special Act of the lands which have been taken. On the other side you must take the assessed value at the time of the lands which have been taken and brought back again into assessment. Those are the two sums you have to take. If the former of those is larger than the latter, then there is a deficiency, and that deficiency has to be made good. If they are equal there is no deficiency. That, in my judgment, is the meaning of the words "such deficiency shall be computed according to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the special Act."

Now, applying those conclusions to this case, the answers will be as follows:—

1. The liability of the defendants to make good the deficiency in the rates terminates when the road and footway have been fully made, and the whole of the lands which have been taken and which may be liable to assessment have become assessable.

2. The liability must be considered and dealt with separately in respect of each undertaking as mentioned in the schedule to the provisional order, and the entire ancient city of Bristol is to be treated as one area.

3. The deficiency is to be computed from time to time until the liability ceases, by comparing on the one hand the assessed

value at the time of the passing of the Act sanctioning the provisional order of the lands taken, and, on the other hand, the assessed value at the time of such computation of such of the lands taken as may have again become assessable, and the excess, if any, of the former value over the latter is the deficiency. (1)

Judgment accordingly.

Solicitors for plaintiffs: *Meredith & Co., for Osborne, Ward, Vassall, & Co., Bristol.*

Solicitors for defendants: *Robins, Burges, & Co., for Heaven, Bristol.*

A. M.

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Feb. 15.

Limitations, Statute of—Particular Estate in Land—Estate in Remainder expectant thereon—Conveyance of Particular Estate—Determination thereof—"Person last entitled"—Right of Remainderman—Limitation of Time—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 2—*Rule in Shelley's Case.*

Where a person entitled to a particular estate in respect of which land is held or the profits thereof or rent received, and upon which a future estate is expectant, conveys away his estate he is not, when the particular estate determines, "the person last entitled to the particular estate upon which the future estate was expectant," and consequently the proviso in s. 2 of the Real Property Limitation Act, 1874, does not apply to limit the time within which the person who on the determination of the particular estate becomes entitled to an estate in possession may make an entry or distress or bring an action to recover such land or rent.

A testator devised certain land to his sons successively for life, beginning with the youngest, and after their death "to be for ever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives for ever." The eldest surviving son being in possession executed, more than six years before his death, a conveyance in fee to the defendant. He left one son, who more than six but within twelve years after his father's death brought this action to recover possession of the land, claiming as devisee under the will of the testator:—

Held, reversing the judgment of Manisty, J., that the claim was not barred, as the plaintiff's father, having conveyed away his life estate, was not "the person last entitled to the particular estate" on which the plaintiff's estate in

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(1) The answer to the third question as above given is not in precisely the form in which it was originally read by Fry, L.J., but it was on a subsequent day modified by the Court.

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remainder was expectant within the meaning of the proviso in s. 2 of the Real Property Limitation Act, 1874.

Held, also, that upon the true construction of the will, the rule in *Shelley's Case* (1 Rep. 93), did not apply, and the eldest surviving son of the testator took only a life estate.

APPEAL from a judgment of Manisty, J., in favour of the defendant in an action to recover possession of certain land.

Joseph Pedder, the grandfather of the plaintiffs, by his will devised the land in question as follows:—"I give and devise unto my lawful son Frederick Pedder my copyhold estate for his sole benefit and advantage during his life, and at his demise it is my particular desire that the said copyhold property shall be inherited and enjoyed by my next youngest son John Pedder for his life, after his demise to be enjoyed by the next surviving son of the younger branch for his life, and so on from son to son till it arrives to the oldest son, then the said copyhold estate to be for ever enjoyed by the oldest surviving heir of my oldest surviving son then living for their life or lives for ever."

The testator died in 1830 leaving four sons, George, Thomas, John, and Frederick. Frederick entered on the death of the testator, and died in 1837 without issue; then John entered and died in the same year without issue. Thomas Pedder then entered, and in 1860 executed a conveyance of the property in fee to one John Young, who enfranchised it, and then demised the property to the defendant for an unexpired term of thirty years. Thomas Pedder, who was the last surviving son of the testator (his brother George having predeceased him), died on December 7, 1877, leaving a son, Thomas, one of the plaintiffs. The other plaintiff, Richard Joseph Pedder, was the son of George, the testator's eldest son.

This action was brought in December, 1884, the plaintiffs claiming that they, or one of them, were entitled as devisees under the will of the testator, and the plaintiff, Richard Joseph Pedder, claiming also as heir-at-law of the testator. The defendant pleaded that he was in possession, and that the plaintiffs' claim was barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, and the Real Property Limitation Act, 1874. Manisty, J., held that Thomas Pedder, who died in 1877, was the person last

entitled to the particular estate upon which the estate in remainder was expectant within s. 2 of the Real Property Limitation Act, 1874 (1), and that as he was not in possession at the time of his death, and more than twelve years had elapsed since his right had first accrued, the plaintiffs had only six years from 1877 to bring the action, and consequently their claim was barred.

The plaintiffs appealed.

Cavanagh, (*J. Black* with him), for the plaintiffs. The proviso in s. 2 of the Real Property Limitation Act, 1874, does not apply to this case. The first part of s. 2 is taken from s. 5 of 3 & 4 Wm. 4, c. 27, but the proviso is new, and only applies where the tenant for life has been dispossessed by a wrongdoer, or has abandoned possession, and where a right of action remains in him. It cannot apply where the tenant for life has conveyed away his interest in the property. The conveyance by Thomas Pedder, the tenant for life, operated to pass his life estate to Young, and so Thomas had no right of entry or action, and the

(1) 37 & 38 Vict. c. 57, s. 1: "After the commencement of this Act no person shall make an entry or distress or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Sect. 2. "A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, ... But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; . . . ."

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time would only begin to run from Thomas's death in 1877: *Cannon* v. *Rimington* (1); *Doe* v. *Woodroffe* (2); Sugden's Real Property Statutes, 2nd ed., 25. The "person last entitled to the particular estate" was Young, and he was in possession in 1877, when that estate determined; hence the plaintiffs had twelve years from 1877 to bring their action. The result of the construction placed upon the section by Manisty, J., would be that the time within which a remainderman could bring his action might be cut down from twelve to six years after the determination of the particular estate at the option of the tenant for life.

W. J. Grubbe, for the defendant. Thomas Pedder was "the person last entitled to the particular estate" within the meaning of s. 2, as he was the person last entitled under the will which created the several estates and interests in the land. Thomas's interest under the will continued until his death, though he was not in possession. Accordingly as Thomas was last entitled to the particular estate upon which the plaintiffs' estate was expectant, and as he was not in possession at his death, the case comes within the proviso of s. 2, and the plaintiffs had only six years from Thomas's death to bring this action.

Secondly, upon the true construction of this will Thomas Pedder, the testator's son, took an estate in fee simple. He was the "oldest surviving son" of the testator; there was accordingly a gift of a life estate to him followed by a gift to his heir. The word "heir" must be treated as a word of limitation, and the eldest surviving son took an estate in fee simple within the rule in *Shelley's Case*. (3) That rule applies equally where the limitation to the heirs is contingent; 1 Preston on Estates, 316; 2 Jarman on Wills, 4th ed. 340. The exception to that rule established in *Archer's Case* (4) does not apply, as there are in this will no words of limitation engrafted on the devise to the heir so as to make the word "heir" a word of purchase. The words "for ever" are not sufficient to shew an intention that the heir should take as persona designata, so as to convert him into a purchaser: *Fuller* v. *Chamier*. (5)

Cavanagh, in reply. The word "heir" in this will is a word of

(1) 12 C. B. 1.
(2) 2 H. L. C. 811.
(3) 1 Rep. 93.
(4) 1 Rep. 66 b.
(5) Law Rep. 2 Eq. 682.

purchase, and so the rule in *Shelley's Case* (1) does not apply. The words "for their life or lives" after the word "heir," shew that it is not used as a word of limitation. The intention of the testator was to create a succession of life estates, and if the successive limitations are void under the rule against perpetuities, the heir-at-law of the testator takes: *Seaward* v. *Willock.* (2)

Cur. adv. vult.

Feb. 15. The judgment of the Court (Lord Esher, M.R., Sir James Hannen, and Fry, L.J.) was read by

FRY, L.J. This is an action of ejectment, in which the plaintiffs claim alternatively as devisees under the will of one Joseph Pedder, who died in the year 1830. The plaintiff, Richard Joseph Pedder, also claims as heir of the testator. The view of the construction of the will and of the facts taken by Manisty, J., was that the will created successive life interests in the testator's sons, Frederick, John and Thomas, and gave to the plaintiffs or one of them an estate in remainder expectant on the life estate of Thomas; that Frederick entered on the death of his father in 1830 and died in 1837; that thereupon John entered and held till his death in the same year; that thereupon Thomas entered and in the year 1860 executed a conveyance in fee to one Young, who demised to the defendant Hunt; that Thomas died in 1877, and that thereupon the estate in remainder of the plaintiffs or one of them became an estate in possession.

This action was brought in 1884, and Manisty, J., has held, on the facts above stated, that it is barred by the Real Property Limitation Act, 1874. The 1st section of that statute gave the plaintiffs twelve years from the time of the first accruing of the right of action. The 2nd section provides that the right to bring an action shall be deemed to have first accrued in respect of an estate in remainder at the time when it became an estate in possession by the determination of the prior estate. These provisions would clearly give the plaintiffs twelve years from 1877. But then the 2nd section goes on to provide that if the person last entitled to a particular estate on which a future estate was

(1) 1 Rep. 93. (2) 5 East, 198.

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expectant, shall not have been in possession or in receipt of the rents when his interest determined, no such action shall be brought by any person becoming entitled to the future estate but within twelve years next after the time when the right to bring an action shall have first accrued to the person whose estate has determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of these two periods shall be the longer. It was argued, and in effect held by the learned judge, that Thomas was the person last entitled to the particular estate; that he was not in possession or in receipt of the rents when his estate determined, and consequently that the plaintiffs had six years only from the year 1877 to bring the action. This reasoning is in our judgment erroneous. The clause in question plainly applies to a case in which the person entitled is out of possession, i.e., where the right to possession and the actual possession are separated: in such cases a cause of action accrues to the owner of the particular estate, and on its cesser another cause of action accrues to the owner of the remainder, and the two periods mentioned in the enactment run respectively from the accruing of these rights of action. In the present case there was no such separation of the right of possession and the actual possession. The conveyance of Thomas to Young in 1860 plainly gave Young an estate during the life of Thomas and conveyed the title to possession to Young. Thomas Pedder, therefore, was not the person last entitled to that particular estate, but Young was that person, and on the death of Thomas Pedder, Young was in possession or in receipt of the rents from his lessees, and consequently the contingency contemplated by the clause in question did not arise.

The construction adopted by the learned judge appears to us at variance with the words of the statute, and would, moreover, lead to remarkable results; for where the owner of a life estate died in possession of the estate, the remainderman would have twelve years to bring his action; where the life tenant died after having assigned it, say to a mortgagee who entered into possession, the remainderman would have six years only; and again, whereas the statute gave the remainderman the longer of

two terms of twelve and six years respectively, the construction in question ties him down, under such circumstances as the present, to a single term of six years only.

For these reasons we are of opinion that the defence founded on the statute fails.

It was next argued that there was no evidence of the marriage of the father and mother of the plaintiff, Richard Joseph Pedder. We expressed our opinion during the argument that there was evidence sufficient to support the finding of the learned judge in favour of the legitimacy of this plaintiff.

The defendant next argued that according to the true construction of the will of Joseph Pedder, and the rule in *Shelley's Case* (1), Thomas Pedder was entitled not for life only but in fee. This point involves a careful consideration of a rather obscure will.

Joseph Pedder, the testator, at the time of his will and of his decease, had four sons, George, Thomas, John, and Frederick. By his will he devised the copyhold hereditaments now in question to his son Frederick during his life, then to John (described as my next youngest son, John Pedder), for his life, and then the testator proceeds in these words: "At his demise to be enjoyed by the next surviving son of the younger branch for his life and so on from son to son till it arrives to the oldest son, then the said copyhold estate to be for ever enjoyed by the oldest surviving heir of my oldest surviving son then living for their life or lives for ever."

We are of opinion that by the words "the next surviving son of the younger branch," the testator signified the next of his sons in the ascending order of seniority who should be living at the death of John Pedder (i.e., in the events which happened, Thomas Pedder); that the testator's eldest son George took a life interest, and a life interest only, under the terms of the will; that by the word "then" after the words "oldest son," the testator indicated the devolution after the death of the eldest son; that the words "my oldest surviving son," meant the last survivor of my sons (i.e., in the events which happened, Thomas Pedder); that the words "then living" are referable to the words

(1) 1 Rep. 93.

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"surviving heir," and not to the words "surviving son;" and that the intention of the testator was, after the gift to his eldest son for life, to create a series of life estates for ever, each of such estates vesting in the heir for the time being of the last survivor of his sons (i.e., in the events which have happened, Thomas Pedder).

It was urged that the gift of an estate for life to Thomas Pedder, followed by a gift to his heir constitutes an estate in fee simple in Thomas Pedder under the rule in *Shelley's Case*. (1) But in our opinion this argument cannot prevail, for it appears to us to be clear law that where the limitation shews the testator's intent to have been that the heir shall take for life only, then the word "heir" is not to be treated as a word of limitation, and the rule does not apply. This point was determined in the case of *White* v. *Collins* (2), a case decided in the Court of Common Pleas in the 5th year of George I. "Common sense will here tell us," says Blackstone, J., in his argument in the case of *Perrin* v. *Blake* (3), "that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir." This observation of the learned judge is adopted by Fearne in his Contingent Remainders, vol. i. p. 153. In the case of *Jordan* v. *Adams* (4) the authority of the case of *White* v. *Collins* (2) was fully recognised, though there was a difference of opinion as to how far that decision affected the case then before the Court.

For these reasons we are of opinion that the plaintiffs are entitled to judgment.

Appeal allowed.

Solicitor for plaintiffs: *J. Cowper Scard.*

Solicitors for defendant: *Montagu Scott & Baker.*

(1) 1 Rep. 93.
(2) Com. 289.
(3) Hargrave's Tracts, 505.
(4) 6 C. B. (N.S.) 748; 9 C. B. (N.S.) 483.

A. M.

In re HOWE. 1887 *March* 4.

Bankruptcy—County Court—Discharge of Bankrupt—Consent Judgment for over 50*l.—Registrar's Fee—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 6, *s.* 127, *sub-s.* 4—*Bankruptcy Rules*, 1886, *r.* 240.

Where a county court grants a bankrupt his discharge subject to his consenting to judgment being entered up against him by the trustee for the balance of debts provable under the bankruptcy, the county court has jurisdiction under r. 240 of the Bankruptcy Rules, 1886, to enter up such judgment, although the amount exceeds 50*l.*; but, the rule being silent as to fees, the registrar is not entitled to any fee in respect of such judgment.

SPECIAL CASE stated for the opinion of the High Court by the judge of the county court holden at Coventry.

On November 17, 1886, the judge of the county court granted the bankrupt his discharge upon condition that he should, pursuant to sub-s. 6 of s. 28 of the Bankruptcy Act, 1883, consent to judgment being entered against him by the trustee for any balance of the debts provable under his bankruptcy which were then unsatisfied. The amount of such debts was 3500*l.*

On November 24, the bankrupt by his solicitor tendered to the deputy registrar of the county court a written consent to judgment in the same court in the form No. 64 in the appendix to the Bankruptcy Rules, 1886, but took no other steps to give the county court jurisdiction to enter up such judgment. The deputy registrar refused to enter this judgment without the direction of the judge on the grounds: 1. That the amount for which judgment was sought being in excess of 50*l.*, the Court had no jurisdiction to enter judgment thereon unless the proceedings pointed out by 19 & 20 Vict. c. 108, s. 23, and Order V., r. 2, of the County Court Rules, 1886, had been taken to give the Court jurisdiction, and unless the fees prescribed by Schedule A. to the Treasury Order regulating county court fees, dated February 12, 1886, and for which he might be held accountable to the Treasury, were duly paid to him. 2. That by reason of s. 127, sub-s. 4, of the Bankruptcy Act, 1883, r. 240 of the Bankruptcy Rules, 1886, could not operate to give any jurisdiction to the county court to enter up a judgment exceeding 50*l.*, which it did not possess under the County Court Acts. 3. That there was nothing in any

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of the County Court Acts, or in any of the rules or scales of fees mentioned in these Acts, or the Bankruptcy Act, 1883, which gave the Court, or the judge, or registrar, power to give judgment for the sum of 30*s.*, for costs mentioned in form No. 63 of the appendix to the Bankruptcy Rules, 1886.

On January 12, the bankrupt applied to the county court judge for an order directing the registrar to enter up judgment in accordance with the consent he had tendered and without any further proceedings being taken therein, and thereupon the judge stated a special case for the opinion of the High Court, and submitted the following questions: 1. Can the judgment the consent to which by the bankrupt was, by the order of the county court sitting in bankruptcy on November 17, 1886, made a condition of his discharge be entered in the county court, and whether with or without any and what preliminary proceedings to give the said Court jurisdiction. 2. If the Court shall be of opinion that the judgment aforesaid can be entered in that Court, what fees ought the registrar thereof to demand from the parties to the said judgment, or either or which of them.

Muir Mackenzie (*Sir E. Clarke, S.G.*, with him), for the Board of Trade, submitted that r. 240 of the Bankruptcy Rules, 1886, was not ultra vires, and that the county court had jurisdiction under it to enter up the consent judgment, but that the rule being silent as to fees, the registrar was not entitled to any fee for entering up such judgment.

CAVE, J. The objection of the deputy registrar in this case to enter up judgment appears to proceed upon a misunderstanding of the effect of the Act. The 28th section, sub-s. 6, provides that "the Court"—which means the county court in a county court case—"may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy, which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court." Now that simply provides that the Court may require the bankrupt to consent to judgment being entered up. It does not state

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where it is to be entered up, or how, and obviously it is a matter which requires further explanation, in the rules. Rule 240 accordingly gives the necessary further directions. By that rule judgment is to be entered up in the Court having jurisdiction in the bankruptcy in which the order of discharge is granted. In this case that is the county court at Coventry, and it is to be entered upon the bankrupt giving consent according to Form 64. This is the form in which that consent is to be given, which has been followed in this case. Form 63 is the form of the order of discharge with conditions. That being so, the whole matter is provided for, and it is very difficult to see what objections can be taken to the judgment being entered up. The deputy registrar, however, appears to have supposed that there was something in s. 127 which invalidated r. 240. Sect. 127, sub-s. 4, provides that the general rules shall not extend the jurisdiction of the Court, and it is said that this rule extends the jurisdiction of the Court. To my mind it is obvious that the meaning of the words "extend the jurisdiction of the Court" is this, that you must not by the rules give the Court some jurisdiction which is not conferred upon it by the Act; but where the Act gives a jurisdiction, and leaves it to the rules to point out how that jurisdiction is to be exercised, the rules do not give any additional jurisdiction. They merely point out the mode in which that jurisdiction is to be exercised. The Act says the Court may direct judgment to be entered up—where? the rules say in the county court. They might have said in the High Court, but it was thought more convenient that it should be entered up in the county court. How does that extend the jurisdiction of the Court? I am quite unable to see how it extends the jurisdiction of the Court. It merely provides the mode in which the judgment is to be entered up. In my opinion, therefore, there is no ground for the objection taken, and my answer to the first question put by the learned judge is, that the judgment can be entered up in the county court holden at Coventry, and without preliminary proceedings, other than such as have already taken place, to give the Court jurisdiction. There is no necessity to issue a plaint or to have a consent. If the legislature had required anything of that sort, or the framers of the rules had thought it desirable, one would

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have found some reference to it either in the Act or the Rules, but there is no reference to anything of the kind.

The second question I am asked is this: if judgment can be entered in that Court, what fees the registrar thereof ought to demand and take from the parties to the same judgment, or either and which of them? Now I think that is a question which fairly comes within the scope of the section and the rule, and which I may answer, because it seems to me desirable that the opinion of the High Court should be given upon the whole of this question. The deputy registrar contends that he is entitled to the fees as payable upon a plaint and upon a hearing in pursuance of a consent order to the trial. But inasmuch as I am clearly of opinion that there is no necessity whatever for any such plaint or consent order, it seems to follow as a matter of course that he cannot charge those fees at all. In my opinion no fee is payable. No fee is provided for doing this either by the Bankruptcy Act or by the Bankruptcy Rules; and it is a well-known principle of law that where a public officer is required to perform a certain duty, he is not entitled to make any charge for doing that duty unless some charge is actually provided for him by enactment of law. In the absence of any such enactment he must do the duty for nothing.

Solicitor: *W. Murton.*

H. L. F.

BONELLA, Appellant; TWICKENHAM LOCAL BOARD OF HEALTH, Respondents. 1887 *March* 14.

HOLMES, Appellant; TWICKENHAM LOCAL BOARD OF HEALTH, Respondents.

Local Government Acts—Sewers—Vesting in Local Authority—Alteration of Sewerage System — Liability for Expenses — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 207.

A piece of land was laid out for building by the owners, and a street laid out, and a sewer made which drained the houses. A local board was afterwards formed. The sewer was sufficient as long as sewage could be discharged into the Thames, but when this was prohibited it became necessary to construct a new sewer to carry the sewage in a different direction. The local board having made a new sewer sought to charge the frontagers with the expenses under s. 150 of the Public Health Act, 1875:—

Held, that the original sewer was not made by any person for his own profit, and therefore vested in the local board under s. 13 of the Act, and by s. 15 they were bound to keep it in repair, that the powers given by s. 150 could only be exercised once for all when the street was first sewered, that the construction of the new sewer was work done by the local board under s. 18, and the expenses were payable out of the general district rate under s. 207, and therefore the frontagers were not liable.

Cases stated by justices under 42 & 43 Vict. c. 49, s. 33.

The facts of the two cases being identical, they were heard together.

The respondents were the urban sanitary authority for the district of Twickenham.

The appellants were the respective owners of two pieces of land fronting, adjoining, and abutting upon a road or street called The Avenue, St. Margaret's, Twickenham, within the said district.

The respondents on July 10, 1884, gave notice to the appellants, in pursuance of s. 150 of the Public Health Act, 1875, to sewer, level, pave, metal, flag, channel, and make good the parts of the street on which their premises fronted, adjoined, or abutted.

The appellants refused to comply with the notices, and the respondents caused the works referred to in the notices to be executed, and the respective proportions of the expenses payable by the appellants as owners of the premises fronting, adjoining,

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or abutting upon the street to be apportioned, and demanded payment, which was refused.

The respondents then summoned the appellants before the justices to recover the amounts so apportioned.

At the hearing of the summonses the following facts were proved.

The street and the land of the appellants are situate in and form part of a piece of land formerly belonging to the Conservative Land Society, called the St. Margaret's Estate, situate in the parishes of Twickenham and Isleworth, in the county of Middlesex.

The Conservative Land Society some years prior to the year 1868, in which year the respondents' board was formed, laid out the estate for building purposes, and The Avenue, the street in question, was laid out and sewered. The sewer in The Avenue, which formerly carried off the sewage from several houses, consisted of a 12-inch pipe, which was laid all along that street until it approached the River Thames, into which it discharged, the outfall being in the parish of Isleworth, which is not under the jurisdiction of the respondents.

The Avenue is situate partly in the parish of Isleworth and partly in the parish of Twickenham.

The sewer was at the time when the notices of July 10, 1884, were given, sufficient for the drainage of the houses and premises fronting, adjoining, or abutting upon The Avenue, assuming that draining into the Thames could be continued.

The respondents' board came into existence in the year 1868, some years after the making of the road and sewer, and the appellants contended that so much of the sewer under The Avenue (including that opposite the appellants' premises), as was in the parish of Twickenham vested in the respondents under the Public Health Act, 1848, or the Public Health Act, 1875.

The respondents were under notice from the Thames Conservators to discontinue the flow or passage of any sewage or any other offensive or injurious matter into the Thames within their district. The new sewer constructed under the notices of July 10, 1884, was a tributary to the respondents' general system of sewerage, and consisted of a 12-inch pipe, and was in an exactly

opposite gradient to the old sewer, falling towards certain outfall works of the respondents. The gradient of the old sewer was left undisturbed, but the sewer itself, as far as it lay in the parish of Twickenham, ceased to carry sewage, and was used for the purpose of carrying off the surface water only.

It was contended on behalf of the appellants that the respondents were not entitled by the notices of July 10, 1884, to call upon them to make the new sewer therein described, inasmuch as the street in question was then already sufficiently sewered; that the work amounted to an alteration in the course of the sewer, which, under the 18th section of the Public Health Act, 1875, ought to have been done by the respondents, and paid for by them out of the general rates of the parish, and not by imposition upon the appellants and the other adjoining owners; that the work which by the notices the appellants were required to do to the existing sewer was work which, as the appellants contended that the sewer was vested in the respondents, it would have been unlawful for the appellants to do, and was in the nature of repairs to a sewer belonging to the respondents, which under the 15th section of the Public Health Act, 1875, the respondents were themselves bound to do, and which they were entitled to pay for out of the general rates, and was work which the respondents only could lawfully do.

The justices ordered that the appellants should pay to the respondents the amounts claimed.

The question for the opinion of the Court was whether they were right in making the said orders.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13: "All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, Except—

(1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders . . . . shall vest in and be under the control of such local authority."

By s. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

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By s. 18: "Any local authority may from time to time enlarge, lessen, alter the course of, cover in, or otherwise improve any sewer belonging to them, and may discontinue, close up, or destroy any such sewer that has in their opinion become unnecessary, on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer; provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance."

Sect. 150 gives power to the urban authority, if a street is not sewered to their satisfaction, to give notice to the owners or occupiers of premises fronting, adjoining, or abutting on the street to sewer it, and if such notice is not complied with the urban authority may execute the works themselves, and recover the expenses from the frontagers.

By s. 207: "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act" (subject to certain exceptions).

Bosanquet, Q.C. (*Edwyn Jones,* with him), for the appellant Bonella, and *Arthur Powell,* for the appellant Holmes. When the local board came into existence, the sewer vested in them under s. 13 of the Public Health Act, 1875; it does not come within the first exception in that section: *Acton Local Board* v. *Batten.* (1) They were liable to keep it in repair by s. 15, and by s. 18 they were the proper persons to execute the works which it became necessary to execute in 1884. By s. 207 they were entitled to charge the expenses on the general district rate, but they were not entitled to charge the frontagers with the expenses of the new sewer under s. 150, which applies to sewers only when they are first made: *Fulham Board* v. *Goodwin* (2); *Vestry of Marylebone* v. *Viret* (3); *Caley* v. *Hull Local Board of Health.* (4)

J. P. Grain, for the respondents in both cases. The original

(1) 28 Ch. D. 283.
(2) 1 Ex. D. 400.
(3) 19 C. B. (N.S.) 424; 34 L. J. (M.C.) 214.
(4) 5 B. & S. 815; S.C. *nom. Cary* v. *Kingston-upon-Hull Local Board,* 34 L. J. (M.C.) 7.

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sewer was made for profit, as it increased the value of the houses which it drained, and therefore came within the first exception in s. 13 of the Public Health Act, 1875, and did not vest in the local board, who are entitled to charge the frontagers with the expenses of the new sewer under s. 150. *Acton Local Board* v. *Batten* (1) is distinguishable, because there the person who made the sewer proved that he did not make it for his own profit.

HUDDLESTON, B. In substance this is an appeal against two orders of justices requiring each of the appellants to pay a proportionate part of the expenses incurred by the Twickenham Local Board in executing certain sewerage works, and we have to decide whether those orders are good. The property in question belonged to the Conservative Land Society. The street was laid out prior to 1868, when the local board came into existence. The sewer, which was made either by the Conservative Land Society or by the proprietors of the houses, is found in the case to have been sufficient for the drainage of the street. That state of affairs continued until 1884. In the meantime the local board came into existence, and I cannot doubt that the system of sewerage then existing was approved and sanctioned by the local board. In 1884, however, pressure was put upon the local board, which made it necessary for them to adopt a different system of sewerage, and in consequence they sought to charge the owners of premises fronting on the street with the expenses incurred by them in executing the works necessary for this purpose. The question therefore, arises as to who is liable to pay for these works, that is, whether the expenses are to fall upon the frontagers or are to be defrayed out of the general district rate. In order to ascertain this it is necessary to consider the powers conferred upon the local board by s. 150 of the Public Health Act, 1875. I cannot help thinking that the meaning of that section is that where land is laid out in streets power is given to the local board to require the frontagers to execute the necessary sewerage works once for all, and I do not think it applies to the present case.

For the respondents it is contended that the sewer never

(1) 28 Ch. D. 283.

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belonged to the local board until they took proceedings to recover these expenses, but on looking at s. 13 of the Act we find that all existing and future sewers within the district are to vest in the local authority, subject to certain exceptions. Then it is contended that this sewer comes within the first of those exceptions, and that it was made either by the owners of the houses for their own profit, or by the Conservative Land Society for the profit of their shareholders. No doubt it was made for the use of the owners of the houses, but the words of the section are "for his own profit," not "for his own use." An illustration of how the exception might apply occurs to me. It might refer to the case of a person who was utilizing sewage, and made a sewer to conduct the sewage to works used for that purpose, or it might apply to a company formed for the purpose of making manure, who might require to conduct the sewage to a particular place, in the course of their business. I think the second exception in the same section bears out this view, for it applies to sewers for the purpose of draining, preserving, or improving land under local or private Acts, or for irrigating land. This provision throws light on the meaning of the expression "profit," and goes to shew that it is not the same as use. If the contention is right no sewers would ever vest in the local board. It seems to me that the case of *Acton Local Board* v. *Batten* (1) is conclusive against the respondents on this point. Kay, J., in giving judgment there said: "That being the state of the case, of course the only question between the local board and Mr. Batten is, Was this a sewer which was vested in them? The 13th section of the Public Health Act, 1875, provides that 'all existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except' as therein mentioned, 'shall vest in and be under the control of' the local authority. The only exception which could possibly apply to this case is 'sewers made by any person for his own profit.' Now I have not the least doubt that this does not come within that exception, because Mr. Carr swears that he did not make this sewer for his own profit at all."

(1) 28 Ch. D. 283.

The respondents contend that this is not proved here, and therefore that case is distinguishable, but the onus of proof would lie on those who allege that the sewer was made by some person for his own profit.

Kay, J., continues as follows: "He made it for the purpose of draining all the houses in this street, many of which do not belong to him. It was, no doubt, for the purpose of draining his own house among others, and the two houses which do belong to him have been connected with it. But if a sewer so made for draining a street of houses would be considered a sewer for the profit of the person who made it, because he connects some of his houses, all I can say is, that almost every sewer in every street of every suburb of every town in England might be considered a sewer made for the profit of the person who constructed it. It is quite clear that is not the meaning of the Act."

The decision in that case is a clear authority for the view that the sewer in the present case is not taken out of the general provisions of s. 13 by the exceptions, and that therefore it vested in the local board. That being so, they had a sewer which was sufficient up to the year 1884, but then they were forced to alter their general system of sewerage, and in consequence had to do certain works. By s. 15 they are bound to keep the sewers in repair, and by s. 18 they have power to make alterations, and if they do so they have power by s. 207 to charge the expenses upon the district rate. I am clearly of opinion that this sewer vested in the local board, and that they must deal with it under the three sections I have last referred to, and not under s. 150.

Our judgment will therefore be for the appellant in each case.

A. L. SMITH, J. The question is whether, where a street has a sewer adequate and sufficient for the street, the frontagers in the street can be compelled, by means of s. 150 of the Public Health Act, 1875, to pay for a new sewer, because the existing system of drainage in the district and outside the street makes it necessary that the system should be altered and a new sewer constructed in the street.

I have no doubt that in 1868 this sewer vested in the local board, for I am clearly of opinion that a person who makes a

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sewer along a road does not come within the first exception contained in s. 13 of the Act merely because his own houses may be drained by the sewer. I agree with the opinion expressed by my brother Huddleston on this point, and with the judgment of Kay, J., to which he has referred. If the law were otherwise all sewers would be taken out of the control of the local board, which would be contrary to the provisions of s. 13, and would make that section a dead letter. From 1868 to 1884 there was a sufficient system of sewerage, but then it became insufficient in consequence of the prohibition against allowing drainage to fall into the Thames. This gave occasion for the exercise of the powers of the local board to repair or alter the sewers or make new sewers. By s. 15 of the Act the local board were bound to keep the sewer in repair, and under s. 18 they had power to discontinue this sewer on condition of providing a sewer as effectual. That is what they have done here, and that is to be done at the cost of the local authority, and by s. 207 they are to be reimbursed out of the general district rate. In my judgment s. 150 applies where the street is first sewered when the local authority take to it, or where it is sewered afterwards for the first time, but applies only when the street is sewered for the first time. Making good the street at first is for the benefit of the frontagers, and they are liable to pay for it under s. 150, but when this has once been done, if the local authority afterwards enlarge or alter the sewers they must proceed under the other sections.

Judgment for the appellants.

Solicitor for the appellant Bonella: *Spaull.*
Solicitors for the appellant Holmes: *Miller, Smith & Bell.*
Solicitors for the local board: *Ruston, Clark, & Ruston.*

P. B. H.

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March 14.

Practice—Security for Costs—Appeal from County Court—Infant Plaintiff—Insolvent Next Friend—Rules of Supreme Court, 1883, *Order LVIII., r.* 15; *Order LIX., r.* 17.

The plaintiff, an infant, brought an action in the County Court, and sued by his next friend. Judgment was given for the defendants with costs, but they were unable to obtain payment owing to the next friend's insolvency. The plaintiff appealed from the judgment.

On an application by the defendants for an order that the next friend should give security for the costs of the appeal:—

Held, that by Rules of Supreme Court, 1883, Order LIX., rule 17, which applies the provisions of Order LVIII., rule 15, to appeals from County Courts, there was power to make an order, and as the next friend was insolvent, and was prosecuting the appeal for the benefit of another person, she must give security.

APPLICATION by the defendants that Mary Anne Swain, the next friend of the infant plaintiff, might be ordered to give security for the costs of an appeal from the County Court at Manchester. The action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42) to recover damages for personal injury, and was tried without a jury before the County Court Judge, who gave judgment for the defendants with costs, which were taxed at 50*l.* 1*s.* 4*d.* The defendants being unable to obtain payment of these costs, caused execution to be issued against the next friend of the plaintiff, but were unable to realize their judgment, in consequence of her insolvency.

By the County Court Rules, 1886, Order V., rule (11): "Where an infant desires to commence an action (other than for wages or piece-work, or for work as a servant) or is a claimant in an interpleader proceeding, he shall procure the attendance of a next friend at the office of the registrar at the time of entering the plaint or delivering the particulars of the goods and chattels alleged to be his property. The plaint shall not be entered or the particulars received until the next friend has undertaken, according to the form in the appendix [Form 64,] to be responsible for costs, and on entering into such undertaking the next friend shall be liable in the same manner and to the same extent as if he were himself the plaintiff; and the action or interpleader

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proceeding shall proceed in the name of the infant by such next friend, and the undertaking shall be filed by the registrar; but no order of the Court shall be necessary for the appointment of such next friend. If the infant fail in or discontinue his action or proceeding, and do not pay the amount of costs ordered to be paid by him to the defendant, proceedings may be taken for the recovery of such amount from the next friend as for the recovery of a judgment debt."

By Order LIX., r. 17 (added to Rules of Supreme Court, 1883, by the Rules of December, 1885): "Subject to these rules, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals from County Courts, and other inferior Courts of record of civil jurisdiction, to the High Court."

By Order LVIII., r. 15: "Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal."

Smyly, for the defendants, in support of the application.

D. Warde, for the plaintiff.

[*Harlock* v. *Ashberry* (1), *Cowell* v. *Taylor* (2), *Clarke* v. *Roche* (3), *Rourke* v. *White Moss Colliery Company* (4), and *Farrer* v. *Lacy, Hartland & Co.* (5) were referred to.]

HUDDLESTON, B. The County Court Judge has found against the plaintiff, and notice of appeal has been given. The present application is that the next friend of the plaintiff may be required to give security for the costs of the appeal. It is clear from Order V., r. 11, of the County Court Rules, 1886, that an infant who brings an action in a County Court must sue by a next friend, who must undertake to be responsible for costs in the same manner and to the same extent as if he were himself the plaintiff. Now, we must look at the proceedings which have taken place in the present case in order to ascertain whether we are justified in requiring the next friend to give security for the

(1) 19 Ch. D. 84.
(2) 31 Ch. D. 34.
(3) 25 W. R. 309.
(4) 1 C. P. D. 556.
(5) 28 Ch. D. 482.

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costs of this appeal. We find that the defendants' costs have been taxed at a considerable sum, for which execution has issued, but it has been found impossible to realize the amount, and applications have been made for payment, to which no satisfactory answers have been returned. I do not wish to enter into the question as to whether the poverty of a plaintiff can ever be considered as a special circumstance to justify an order for security for costs. That is not this case, for this is the case of an appeal, and it is not the appeal of the party himself, but of his next friend. It is clear from the Rules of the Supreme Court, 1883, Order LVIII., r. 15, and Order LIX., r. 17, that we have power to make an order for security, and the question is whether we ought to exercise that power in the present case. It seems to me that the judgment of Bowen, L.J., in *Cowell* v. *Taylor* (1) is almost conclusive on this point. He said in that case: "The general rule is that poverty is no bar to a litigant; that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the court, but only prevented, if he cannot find security, from dragging his opponent from one court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow."

Those two views apply here. This is the case of an insolvent next friend of an infant plaintiff, who is dragging her opponents from one court to another, and it is also the case of an insolvent carrying on litigation for the benefit of somebody else. She is indulging in the luxury of an appeal, and under these circumstances, I think the order for security for costs ought to be made.

A. L. SMITH, J. I entirely agree. It is said on behalf of the plaintiff that to order security for costs may amount to a denial of justice, but it seems to me that it would be much more like a

(1) 31 Ch. D. at p. 38.

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denial of justice to allow this insolvent appellant to drag the respondents from one court to another without finding security for costs.

The case of *Rourke* v. *White Moss Colliery Co.* (1) does not apply, for it cannot be said here that the appellant has become insolvent in consequence of the accident, as appears to have been the case there.

Application granted.

Solicitors for plaintiff: *Johnson, Harris, & Dowding, for Sims, Manchester.*

Solicitors for defendants: *Horne & Birkett, for Thompson, Manchester.*

P. B. H.

March 30.

[IN THE COURT OF APPEAL.]

IRWELL *v.* EDEN.

Practice—Discovery in Aid of Execution—Examination of Person other than Debtor—Order XLII., r. 32.

There is no power under Order XLII., rule 32, when a judgment or order has been obtained for the recovery or payment of money, to make an order for the examination of any person other than the debtor liable under such judgment or order, or in the case of a corporation, other than an officer of the defendant corporation.

IN this case judgment was obtained against the defendant for the recovery of a sum of money. The defendant was out of the way, and an application was made to a master for an order under Order XLII., r. 32, for the examination of a person who had formerly been manager of the defendant's business. The master was of opinion that as an order had been previously made for the attendance and examination of the debtor, he had authority to make, and he accordingly made, an order which was set aside by Field, J. On appeal to the Divisional Court the matter came before Denman and Hawkins, JJ., who differed in opinion. The order of Field, J., was therefore affirmed, and the plaintiff appealed.

(1) 1 C. P. D. 556.

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1887. Jan. 11. *Cock, Q.C.*, and *W. S. Goddard*, for the plaintiff. The power given by the rule is to make an order for the attendance or examination of the debtor "or any other person." The words are perfectly general, and include such a case as the present. The object of the rule is to obtain discovery in aid of execution, and if the debtor keeps out of the way the judgment obtained may be valueless unless there is power to examine persons other than the debtor.

Cur. adv. vult.

March 30. LORD ESHER, M.R. This was a case heard before my brother Bowen and myself, and he agrees in the view which I am about to express.

The question arises under Order XLII., r. 32, and is whether the person whom it is desired to call and examine is within the rule. The defendant in this case is an individual and not a corporation, and judgment for the recovery of a sum of money has been obtained against him. The person whom it is proposed to examine had been manager to the defendant, who is abroad, or for some reason is not to be got at. The question arises under the concluding words of the rule, and is whether the person whom it is sought to examine is such a person as can be brought within those words. The rule is, "when a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court or judge shall appoint." If the rule stopped there there could be no doubt that it would be only the individual debtor, or, in the case of a corporation, only officers of the corporation, who could be summoned to attend for examination. But the rule continues, "and the Court or judge may make an order for the attendance and examination of such debtor, or of any other person, and for the production of any books or documents." We have come to the conclusion that the expression "any other person" does not include within the rule in the case of an

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individual debtor any other person than himself, or, in the case of a corporation any one but officers of the corporation, and that it does not enable an order to be made except in such cases. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *E. Hart Smith.*

A. M.

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March 15.

[IN THE COURT OF APPEAL].

DREW & CO. *v.* JOSOLYNE.

Bankruptcy—Trustee in Bankruptcy, Completion of Contract by—Assignment of Moneys due under Building Contract—Power to take Work out of Contractors' Hands.

A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors' committing an act of bankruptcy, to discharge them from the further execution of the work, and employ some other person to complete it, and to deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the retention moneys, i.e., the price of work done under the contract retained under the before-mentioned provision, by way of mortgage to secure a debt, and notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee and the mortgagees both claimed the amount of the retention moneys assigned as aforesaid from the building owners. On an interpleader issue to try the title to such moneys:—

Held, that, in the absence of anything to shew that the building owners had exercised the power of taking the work out of the contractors' hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed.

Tooth v. *Hallett* (Law Rep. 4 Ch. 242) distinguished.

APPEAL from the judgment of Field, J., upon an interpleader issue.

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The facts were as follows:—

In June, 1880, Messrs. Braid & Gwynn, contractors, entered into a contract with Messrs. A. & W. H. Tylor to build a factory for them for the sum of 12,650*l*. The specification incorporated by such contract provided that payment should be made, as the work proceeded, of such sums on account of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent., or such sum as should be found to be due to the contractors on account of the work, should be paid within one month of the production by the contractors of a certificate by the architect that the works had been completed to his satisfaction. There was a clause in the contract providing that, in case the contractors should at any time during the execution of the works become bankrupt or commit any act of bankruptcy, then the building owners might dismiss and discharge the contractors from the further execution of the works, and employ some other person or persons to complete the same, and in such case the several materials brought on the premises for the purpose of being used in the works should become the property of the building owners, and the sum or sums paid to such other person or persons to complete the works should be deducted from the amount of the contract, and the balance, if any, after making any other deductions which the owners might be entitled to make, should be paid to the contractors upon the architect certifying that the works had been completed to his satisfaction.

The contractors, during the progress of the works, from time to time procured ironmongery necessary for their execution from the plaintiffs.

On February 8, 1881, the contractors were indebted to the plaintiffs for goods so supplied to the amount of 550*l*.; and, to secure that amount and the price of any further goods which might be so supplied, they assigned to the plaintiffs by deed by way of mortgage "the sum of 1000*l*. due and owing to them, or which might thereafter become due and owing to them under the thereinbefore recited agreement (the building contract), and

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being part of the retention money mentioned and referred to in the thereinbefore recited specification, and being a portion of the 20 per cent. or such other sum as might be found due to the mortgagors, and to be paid to them within one month of the production by them of the architect's certificate that the works had been completed to his satisfaction." At the date of such assignment the architect had certified to the amount of 3000*l.*

On July 1, 1881, the contractors, being then indebted to the plaintiffs for goods supplied in the sum of 1885*l.*, made a second assignment to the plaintiffs by way of mortgage of a further sum of 600*l.*, being retention moneys under the contract, in similar terms. The architect had at that date given further certificates to the amount of 4150*l.* Notices of both the assignments were given to the building owners.

On July 14, 1881, a further certificate for 750*l.* was given by the architect. On July 15, 1881, the contractors presented a petition for liquidation of their affairs. The contract value of the work then done was 9240*l.* 18*s.* 11*d.*, the contract value of the work done after the liquidation as hereafter mentioned being 3391*l.* 1*s.* 5*d.* One Baynham, since deceased, who was the partner of the defendant Josolyne, was appointed trustee in the liquidation, and a committee of inspection was appointed. On August 26, 1881, the committee of inspection passed a resolution to the effect that the trustee was authorized to carry out the pending contracts of the liquidating debtors, and to advance or obtain from his firm the necessary sums of money; and, in consideration of his so doing, he was to retain out of the assets the sum of 150*l.* a month, such amount to include his remuneration as trustee and to cover interest on advances, but not to include payments out of pocket, such as travelling expenses, &c.; and, if a loss resulted on the completion of any or all of the contracts, he was to pay such loss out of the other assets, but, if they were not sufficient, to bear the balance of such loss himself.

On the same day the defendant's firm, Josolyne & Baynham, sent to the plaintiffs a letter stating that the trustee and committee of inspection had decided to carry on and complete the contracts entered into by the liquidating debtors, and that the defendant's firm could not hold themselves responsible for any

order given in their name unless it bore the signature of their firm or of the trustee, and requesting the plaintiffs to forward the invoices of all goods supplied to the defendant's firm at an address above-mentioned.

The work under the building contract was continued and finished under the above-mentioned resolution. The defendant's firm expended the sum of £4327 10*s.* 11*d.* out of their own moneys in completing the work, of which £1875 12*s.* 6*d.* was unpaid, there being no assets of the liquidating debtors out of which it could be paid. The plaintiffs supplied ironmongery for the work to Josolyne & Baynham after the liquidation, and knew that they were completing the works with their own moneys. Further certificates were given by the architect to the amount of £4732 0*s.* 4*d.* Of this sum the building owners retained an amount equal to that of the sums assigned by the deeds of February and July, 1881, and in October, 1882, Baynham sued them for that amount. The plaintiffs also claimed the amount so retained under the deeds of assignment. The building owners interpleaded, and the interpleader issue was ordered to determine the title to the moneys so retained. The original parties to the issue were Drew & Co., as plaintiffs, and Baynham, as defendant, but, Baynham, the trustee, having since died, the proceedings were carried on between the plaintiffs and Josolyne, the present defendant, who was appointed in Baynham's place. On the above facts the learned judge gave judgment for the defendant, being of opinion that the case was governed by *Tooth* v. *Hallett.* (1)

Charles, Q.C., Pitt Lewis, Q.C., and *De Colyar,* for the plaintiffs. The retention moneys assigned had been already earned though they were not payable till after the completion of the work. The work was completed by the trustee in liquidation under the original contract, and the retention moneys thereupon became payable to the plaintiffs as assignees of them. *Tooth* v. *Hallett* (1) was an entirely different case from the present. There the building owner had exercised the power given him by the contract of putting an end to the execution of the work by the contractor and had employed the trustee to complete it on his own account, and by the contract the sums paid to any person so

(1) Law Rep. 4 Ch. 242.

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employed were to be deducted from the contract price: and the result was that there was no balance in that case on which the assignment could operate. Here the building owners have not done anything which could be construed as an exercise of the power to put an end to the execution of the work under the contract. The trustee merely carried on the original contract as representing the contractors' estate, and stands in their shoes quoad the assignment of the retention moneys. They also cited *Brice* v. *Bannister* (1); *Ex parte Moss* (2); *Falcke* v. *Scottish Imperial Assurance Co.* (3)

Sidney Woolf (*Jelf, Q.C.*, with him), for the defendant. The retention moneys never could become payable but for the expenditure by the trustee of his own moneys in completing the works. No one concerned could suppose that the trustee meant to expend his own moneys without being recouped in order to complete the works merely for the benefit of the mortgagees of the retention moneys. The mortgagees, who stood by, knowing that the trustee was expending his own money to complete the contract, cannot in equity enforce their mortgage in priority to the trustee's right to be recouped. The contract work never was completed under the original contract so as to entitle the assignees of the contractors to the retention moneys. At any rate the trustee is entitled to be recouped in priority to the right of the assignees. The case of *Tooth* v. *Hallett* (4) is substantially identical with the present case. It is not necessary that there should be a formal exercise by the building owners of the power to take the works out of the contractor's hands; the building owners acquiesced in the trustee's completing the work, and in substance the power was acted on, and the trustee was employed by them to complete the contract work under a new contract in substitution for the contractors. Thus the contractors never could complete the works under the old contract, and therefore the assignees of the contractors cannot claim to be entitled to receive the retention moneys as against the trustee who is entitled to be repaid what he has expended in completing the works.

Charles, Q.C., did not reply.

(1) 3 Q. B. D. 569.
(2) 14 Q. B. D. 310.
(3) 34 Ch. D. 234.
(4) 4 Ch. D. 242.

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LORD ESHER, M.R. This appears to me a very plain case. There was a contract between building owners and contractors for the erection of a building, and the contract contained a stipulation that the building owners might in certain events take the work out of the contractors' hands. The payment for the work was to be by payments on account, as it proceeded, upon the certificates of the architect as to the amount of work done, but 20 per cent. of the contract price of the work done was to be kept back and was not to be payable till the work was finished and a certificate given by the architect that it was completed to his satisfaction. The work proceeded and certificates were given and payments made; but the contractors went subsequently into liquidation. Thereupon the building owners had the option of stopping the execution of the work by the contractors and taking the work into their own hands. If the building owners had exercised that option, the contractors could not have finished the work, nor any one else as representing them. But I see nothing to shew that the building owners did in fact put an end to the execution of the work under the contract and take the work into their own hands. What then was the position of the trustee in liquidation? He was not obliged to carry out the contract. He might have said that he would have nothing to do with it. The trustee, however, had an option to go on with the contract. There could be no new contract without the building owners' consent. It would be a perversion of language to say that the law by giving power to the trustee to carry on the contract means that he may make a new contract. If he elects to go on with the work, he goes on under the old contract as the trustee of the liquidating debtors' estate and will take their rights under the contract subject to any valid assignment which they may have made of such rights. When the building owners refrained from taking the work out of the contractors' hands and the trustee elected to go on with it, the old contract, as it seems to me, continued in effect. The contract work went on and was completed, and the architect certified acccordingly, under the old contract, and, thereupon, if there had been no question of any assignment, the building owners would have been bound to pay the retention moneys over to the trustee. But there had been an equitable

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Lord Esher, M.R.

assignment of a portion of those moneys by the contractors before the liquidation, of which the building owners had notice; and in consequence they are bound to pay such portion of them to the assignees. It is argued that in holding that they are so bound we shall be contravening what was decided in *Tooth* v. *Hallett*. (1) In that case there was the same power given to the building owner to take the work out of the hands of the contractor, but the vital difference between that case and the present is, as it seems to me, that there the building owner had acted on the power and taken the work out of the contractor's hands. Whether he had done so was a question of fact. It appears to me that the judgment of Selwyn, L.J., proceeds on the view that he had done so, and Cotton, L.J., in the subsequent case of *Brice* v. *Bannister* (2), took the same view of the case of *Tooth* v. *Hallett* (1), viz., that the building owner there not only had the power to take but actually had taken the work out of the original contractor's hands. That case is therefore no authority for the present, where we find that the building owners did not put an end to the doing of the work under the original contract and the trustee elected to go on under the contract. For these reasons I cannot agree with the decision of Field, J., and I think this appeal must be allowed.

BOWEN, L.J. I am of the same opinion. It seems to me that this is really a very simple case, and involves nothing but the application of the most ordinary principles of law when the facts are understood. Building owners employ contractors to erect certain buildings, and the latter assign as security for a debt certain retention money, the price of work done, but which is to become payable to them by way of balance upon the completion of the buildings under the contract: and notice of such assignment is given to the building owners. The question we have to determine is, as it seems to me, whether under the circumstances which occurred after the liquidation the work must be considered to have been completed under the old contract, and the retention moneys have thereupon become payable under it. The contract gave power to the building owners in the event of the

(1) Law Rep. 4 Ch. 242. (2) 3 Q. B. D. 569.

bankruptcy or insolvency of the contractors to put an end to the execution of the works by the contractors under the contract, and discharge the contractors, and employ some one else to complete the work: and the balance of the contract price, that might be due to the contractors on the completion of the work, was to be subject to the deduction of the sums paid for the completion of the same to any other person so employed. There was such a power, but in the present case it does not appear to me to have been exercised. I agree that it would not be necessary that a writing or any particular formality should be used in order to exercise such power. We have to consider what is the true inference from what took place, whether the doing of the work under the old contract was put an end to and a new contract made with the trustee or the work continued to be done under the old contract. The truth is that the trustee simply carried on the contract of the liquidating debtors. It may be that the trustee or his firm found the money which enabled the contract to be carried on and completed, without which the retention moneys would not have become payable, but that was his own affair, and could not give him any priority over the equitable assignees of the retention moneys; nor do I see that anything else took place to give him such priority. The old contract continued to subsist and the assignment by the contractors of the retention moneys to become due under it still held good. I agree with what the Master of the Rolls has said about *Tooth* v. *Hallett* (1). That case really decided nothing new, but was merely an application of the ordinary principles of law to a clause in a building contract based on the finding of a fact in the case, viz., that the building owner did put an end to the work under the old contract, and entered into a new arrangement with the trustee to complete the work; under those circumstances it was held that, as the building owners could deduct from the money coming to the original contractors the sums paid to the person employed to complete the work, and there was, when that deduction was made, no balance due under the old contract, the claim of the mortgagee failed. Here the retention moneys are due under the original contract, and the assignment must operate upon them.

(1) Law Rep. 4 Ch. 242.

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FRY, L.J. I am of the same opinion. Here there was a building contract under which the contract price was to be paid in the usual way, viz., by payments on account upon the certificates of an architect and payment of the balance after completion of the work. The builders mortgaged a portion of the retention moneys to become payable to them. These moneys were the price of work already done, which however would not become payable till the whole of the work was completed. The mortgagors of those moneys could not set up a title to be recouped the moneys expended in completing the contract in priority to their own assigns, nor could any person claiming under them. The trustee comes in under the mortgagors as trustee of their estate, and the committee of inspection request him to carry on the contract upon which the liquidating debtors were engaged at the time of the liquidation. If this contract was so carried on, then the trustee so carrying it on claims under the mortgagors and could not claim anything expended in completing the contract against their mortgagees of the retention moneys. But it is said that the building owners had power to put an end to the execution of the work under the old contract, and to employ other persons to complete the work, in which case they were entitled to pay such sums as might be necessary to those persons and to deduct them from any sum payable to the contractors under the old contract; and it is said that they must be deemed in effect to have acted on that power. But there is not the slightest evidence that the building owners did anything of the sort: on the contrary, everything went on as before under the original contract. It is clear that the trustee acted under the resolution of the committee of inspection, which did not entitle him to make a new contract on his own account, but only to carry on the existing contract for the benefit of the debtor's estate. It would have been contrary to his duty to enter into a new contract. The case of *Tooth* v. *Hallett* (1) has really no bearing on the present case. It was a case in which the building owner did enter into new relations with the trustee, and treated him as a person employed in substitution for the original contractor. He paid the trustee for the work done by him, and had a right under the contract to deduct

(1) Law Rep. 4 Ch. 242.

the payments so made from any balance due to the contractor, and it was held that under the circumstances he was entitled to make the payments he had made to the trustee. For these reasons I agree that this appeal should be allowed and judgment entered for the plaintiffs.

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Appeal allowed.

Solicitors for plaintiff: *Rhodes & Sons.*

Solicitors for defendant: *C. A. Bannister.*

E. L.

ESDAILE AND ANOTHER, RESPONDENTS; *v.* THE ASSESSMENT COMMITTEE OF THE CITY OF LONDON UNION, APPELLANTS.

Feb. 22, 23; *March* 8.

*Poor-rate—Tithes in London—Rate on House Property—Commutation for Fixed Annual Payment—Payment in lieu of Tithes—*37 *Hen.* 8, *c.* 12—43 *Eliz. c.* 2.

By 37 Hen. 8, c. 12, provision was made for payment to the clergy in London and their successors of a rate calculated on the rent of the houses. In this and several subsequent statutes the rate was described as "tithes."

A special Act passed in 1881 provided that tithes and sums of money in lieu of tithes in a parish in London should cease and be determined, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum to be charged on the rates:—

Held, that such annual sum was a personal payment, and was not payable in respect of tithes or payments in lieu of tithes, and therefore was not rateable to the poor-rate under 43 Eliz. c. 2.

SPECIAL CASE.

Messrs. Esdaile and Badcock, the present respondents, appealed against an assessment in a valuation list for the parish of St. Botolph Without, in the city of London, whereby they were assessed as the lay impropriators of tithes of the value of 6500*l.* per annum.

The court of general assessment sessions allowed the appeal, and struck out the assessment from the valuation list, subject to the following case:—

William Clement Drake Esdaile and Henry Jeffries Badcock are trustees under the will of Edward Jeffries Esdaile, deceased, and in such capacity are possessed of all his interest as owner of certain tithes, or sums of money, arising in the said parish, and payable by virtue of 37 Hen. 8, c. 12, and of the annual sum

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of 6500*l.* in lieu and satisfaction of part thereof, payable by virtue of 44 & 45 Vict. c. cxcvii.

By 37 Hen. 8, c. 12 (An Act for Tithes in London), it is recited as follows:—"Where of late time contention, strife and variance hath risen and grown within the city of London and the liberties of the same, between the parsons, vicars, and curates of the said city and the citizens and inhabitants of the same for and concerning the payment of tithes, oblations, and other duties within the said city and liberties."

The Act then provides that certain commissioners therein named may make a decree for appeasing the same, which decree shall stand, remain, and be as an Act of Parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being as the said parsons, vicars and curates and their successors for ever.

The decree commences as follows:—"As touching the payment of tithes in the city of London and the liberties of the same, it is fully ordered and decreed by Thomas, Archbishop of Canterbury" (here follow the names of the other commissioners) "that the citizens and inhabitants of the said city of London and liberties of the same for the time being shall yearly without fraud or covin for ever pay their tithes to the parsons, vicars and curates of the said city and their successors for the time being after the rate hereafter following, that is, to wit, of every 10*s.* rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same 16½*d.*, and of every 20*s.* rent by the year of all and every such house and houses, shops, warehouses, cellars and stables, and every of them within the said city and liberties 2*s.* 9*d.*, and so above the rent of 20*s.* by the year ascending from 10*s.* to 10*s.* according to the rate aforesaid."

Edward Jeffries Esdaile was at the time of his death on February 14, 1881, owner of the tithes or sums of money arising in the parish and payable under 37 Hen. 8, c. 12.

By s. 16 of the London (City) Tithes Act, 1879 (42 & 43 Vict. c. clxxvi.), ("An Act for the Commutation of Tithes in the City of London, and for other purposes"): "Nothing in this Act contained shall apply to or in any wise affect the parish of St.

Botolph Without, Aldgate, or any rights of Edward Jeffries Esdaile, or his successors in title, to tithes, or payments instead of tithes, arising or growing due within the said parish."

By the London (City) Tithes (St. Botolph Without, Aldgate) Act, 1881 (44 & 45 Vict. c. cxcvii., "An Act to commute the Tithes in the Parish of St. Botolph Without, Aldgate, in the City of London, and for other purposes,") it is recited as follows:—

"Whereas by the Act of 1879 (s. 16), it was enacted that nothing therein contained should apply to or in anywise affect the parish of St. Botolph Without, Aldgate, or any rights of Edward Jeffries Esdaile or his successors in title to tithes, or payments instead of tithes, arising or growing due within the said parish. And whereas there are disputes as to the payments to be made in respect of tithes in the said parish of St. Botolph Without, Aldgate, and it is expedient for the settlement of the same, and it will be beneficial to the inhabitants of the said parish and the owner of the tithes of the said parish, that all such disputes should be settled, and that there should be paid to such owner a fixed annual sum in lieu and in full satisfaction of all tithes, or payments in lieu of tithes, within the said parish in manner hereinafter mentioned."

By s. 2 the term "tithe-owner" is defined to mean "the person or persons for the time being who but for this Act would have been entitled to the tithes, or sums of money in lieu of tithes, arising or growing due in the said parish."

By s. 3, "All tithes and sums of money in lieu of tithes whatsoever arising or growing due in the said parish except upon" certain railway stations "shall as and from the 29th day of September, 1881, cease and be extinguished, and the tithe-owner shall as from that day accept and receive in lieu and satisfaction of the tithes and sums of money in lieu of tithes so ceasing and extinguished, and to which he would have been entitled if this Act had not been passed, the annual sum of 6500*l.*, which shall be levied and collected by the churchwardens on and from the persons by law rateable to poor-rates in the said parish in respect of the houses by law rateable to poor-rates" (except certain railway stations) "and shall be assessed on the annual rateable value of those houses as ascertained by the valua-

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tion or assessment for the poor-rates for the time being in force, and the said sum of 6500*l.* shall be paid by the churchwardens to the tithe-owner in each and every year after the said 29th day of September, 1881, by two half-yearly payments, and the first of such half-yearly payments shall be made on the 25th day of March, 1882."

The valuation list in respect of which the appeal arises was duly made by the overseers of the parish on or about June 26, 1885, and subsequently approved by the assessment committee of the City of London Union, and the tithes, or sums of money, or the annual sum in lieu and satisfaction of part thereof, are or is therein described as follows :—

No.	Name of Occupier.	Name of Owner.	Description of Property.	Gross value as finally determined by Assessment Committee.	Rateable value as finally determined by Assessment Committee.
890	Esdaile Trustees.	Lay Impropriator.	Tithe.	£6500	£6500

It was admitted that the said tithes or sums of money, or the annual sum in lieu and satisfaction of part thereof, had never been assessed for the relief of the poor, nor had any person been rated in respect thereof.

By the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 51, it is provided that the overseers shall include in every valuation list "tithes, and payments in lieu of tithes, and every hereditament in their parish, and shall enter every hereditament in the valuation list in accordance with the classes mentioned in the third schedule to this Act."

It was contended on behalf of the appellants below (the present respondents) that the sum of 6500*l.* ought not to have been inserted in the valuation list or assessed to the relief of the poor, on the grounds that the payments under 37 Hen. 8, c. 12, were not rateable, as they were not tithes within the meaning of 43 Eliz. c. 2, and that the annual sum payable in lieu and satisfaction of part thereof under 44 & 45 Vict. c. cxcvii., was not rateable, as it was not a money payment in lieu of tithes within

the meaning of 43 Eliz. c. 2, and that neither the payments under 37 Hen. 8, c. 12, nor the said sum of 6500*l.* had ever been assessed or rated.

It was contended by the assessment committee that the sum of 6500*l.* was tithes within the meaning of 43 Eliz. c. 2, or a payment in lieu of such tithes, and was therefore properly inserted in the valuation list.

The court of general assessment sessions held that the payment of 6500*l.* was not tithes within the meaning of 43 Eliz. c. 2, nor a payment in lieu of tithes, and ordered that the valuation list be altered by striking out the entry relating to the hereditaments the subject of the appeal.

The question for the opinion of the Court was, whether the sum of 6500*l.* was liable to be inserted in the valuation list?

If the Court were of opinion that it was, the order of the court of general assessment sessions was to be quashed and the assessment was to stand.

If the Court were of the contrary opinion the order was to stand confirmed.

1887. Feb. 22, 23. *Sir Edward Clarke, S.G.*, and *Poland*, for the assessment committee. This annual payment of 6500*l.* is either tithes or payment in lieu of tithes, and the assessment was therefore correct, and the order of sessions wrong. The right to the payment was derived originally from 37 Hen. 8, c. 12, which provides in express terms for payment of tithes. By 43 Eliz. c. 2, the occupiers of tithes are liable to the poor-rate, and by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 51, the overseers are to include in the valuation list tithes and payments in lieu of tithes. The second case of *Esdaile* v. *Payne* (1) is strongly in favour of the view that this payment is rateable.

Sir Richard Webster, A.G., and *Sidney Woolf*, for the respondents. The order of sessions was right. The Valuation (Metropolis) Act, 1869, is not a rating Act, and creates no liability. The payments made under 37 Hen. 8, c. 12, had nothing to do with the land, and were therefore distinct from tithes, and not charge-

(1) 54 L. T. (N.S.) 705.

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able under 43 Eliz. c. 2. There was no remedy against the land; the remedy was personal by complaint to the mayor or Lord Chancellor (37 Hen. 8, c. 12, ss. 1, 19, 20). The fact that the word "tithes" is used in the Act, cannot affect the nature of the payments so as to make them rateable. The first case of *Esdaile* v. *Payne* (1) supports the respondents' contention, and the second case (2) is not an authority the other way.

[The following statutes and authorities were also referred to: 2 & 3 Edw. 6, c. 13, s. 12; 22 & 23 Car. 2, c. 15; 44 Geo. 3, c. lxxxix.; 6 Geo. 4, c. clxxvi.; 2 & 3 Will. 4, c. 100; 6 & 7 Will. 4, c. 71; 6 & 7 Will. 4, c. 96; 3 & 4 Vict. c. 89; 25 & 26 Vict. c. 103; 27 & 28 Vict. c. 39; 42 & 43 Vict. c. clxxvi.; 44 & 45 Vict. c. cxcvii.; *Dunn* v. *Burrell and Goffe* (3); *Lowndes* v. *Horne* (4); *Rex* v. *Toms* (5); *Rex* v. *Carlyon* (6); *Chatfield* v. *Ruston* (7); *Rex* v. *Boldero* (8); *Rex* v. *Joddrell* (9); *Reg.* v. *Shaw* (10); *Reg.* v. *Christopherson.* (11)]

Sir Edward Clarke, S.G., replied.

Cur adv. vult.

1887. March 8. The judgment of the Court (Denman and Mathew, JJ.) was read by

MATHEW, J. This was an appeal against a decision of the general assessment sessions held under the Metropolitan Valuation Act, 1869, striking out of the valuation list for the parish of St. Botolph Without, Aldgate, a sum of 6500*l.*, at which the respondents had been assessed as the lay impropriators of tithes valued at that amount.

The respondents were admitted to be the owners of the tithes and the sums of money payable in the parish by the Act of 37 Hen. 8, c. 12, and of the annual amount of 6500*l.*, in lieu and satisfaction of part thereof payable by the Act 44 & 45 Vict. c. cxcvii.

The question raised for our decision was whether the respond-

(1) 52 L. T. (N.S.) 530.
(2) 54 L. T. (N.S.) 705.
(3) Calthrop, 93; 1 Eagle & Young, 270.
(4) 2 W. Bl. 1252.
(5) 1 Douglas, 401.
(6) 3 T. R. 385.
(7) 3 B. & C. 863.
(8) 4 B. & C. 467.
(9) 1 B. & Ad. 403.
(10) 12 Q. B. 419.
(11) 16 Q. B. D. 7.

ents ought to be assessed under the 43 Eliz. c. 2, in the sum of 6500*l.*, as being payable in respect of tithes, or payments in lieu of tithes.

It was pointed out in the course of the argument for the appellants, that the payments referred to in the Act of Henry VIII., had been described in a long series of statutes, down to the Commutation Act for this parish passed in the year 1881, as tithes or payments in lieu of tithes; and it was argued that they were payments intended to form part of the income of the parson or vicar, and therefore assessable to the relief of the poor at the time of the passing of the 43 Eliz. c. 2. This assessable character, it was said, was transferred to the amount of 6500*l.*, at which these payments had been commuted.

On the other hand it was contended for the respondents, that the payments mentioned in the Act of Henry VIII. were not tithes in the legal sense, because lands covered with houses were not titheable. It was said that the tithes, oblations and other duties with which the statute dealt were all personal payments of the same character, viz., contributions from the citizens of London towards the maintenance of the clergy, which had become to some extent obligatory by custom or otherwise.

The history of these payments will be found in 2 Eagle on Tithes, 442 et seq., and the learned author's view that they were not tithes or payments in lieu of tithes received the sanction of the Court of Appeal in *Esdaile* v. *Payne*. (1)

The object of the Act of Henry VIII. would seem to have been to render these payments certain and tangible, and, as appears from the preamble to the statute, to terminate "the contention, strife, and variances," which had arisen on the subject between the parsons, vicars and curates and the citizens. By the Act it was proposed to substitute for these payments a rate calculated upon the rents of the houses then built and to be thereafter erected within the City and liberties.

The many decisions upon the statute with respect to these payments, which will be found in the text-books on the subject of tithes in London, shew that they never became certain, and that disputes with respect to them continued until recent times.

(1) 52 L. T. (N.S.) 530; 54 L. T. (N.S.) 705.

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The differences in the parish of St. Botolph would seem to have lasted down to the passing of the Commutation Act of 1881.

That such charges are not assessable under the statute of Elizabeth appears to be settled by the judgment of this Division in the case of *Reg.* v. *Christopherson*, which was affirmed by the Court of Appeal. (1) But even if there were not this authority on the subject, there would be great difficulty in adopting the contention of the appellants.

It is a significant fact that no assessment upon these payments has ever been made in this parish, and that there would seem to be no decision to the effect that similar payments have been rateable in the other parishes in the city of London.

It is further to be observed that while the Tithes Commutation Act (6 & 7 Will. 4, c. 71, s. 69), expressly provides that rent-charges in lieu of tithes shall be liable to all such rates, charges, and assessments, as tithes have theretofore been subject to, there is no recognition or imposition of any such liability in the general Act for the commutation of tithes in the city of London, 1879. But that the payment of 6500*l.* is not intended to be assessable, appears to be clearly indicated by the Act for the commutation of tithes in this parish passed in 1881 (44 & 45 Vict. c. cxcvii.). The statute confirms a compromise and settlement entered into between the parish and tithe-owners. For the purpose of carrying out this compromise the parish is to raise annually 6500*l.* by a tithe-rate, which is in effect an addition to the poor-rate (s. 8). This sum of 6500*l.* is to be paid to the tithe-owners by equal half-yearly payments (s. 3). Now if the appellants be right, the parish is not made liable to pay to the tithe-owners the amount of the commutation, but that sum reduced by an uncertain rebate or repayment of the rates for the poor, and, as it would seem, other parochial charges. It is extremely improbable that any such bargain would be made by the tithe-owners. That it was not meant seems clear from s. 10, which provides for the redemption of the tithe-rates.

Under that section, if the parish desires to get rid of the rates, the ratepayers would practically be bound to find a sum which after payment of the costs of investment would produce an

(1) 16 Q. B. D. 7.

annual amount of 6500*l.*, if invested in 3 per cent. Consolidated Bank Annuities. This annual amount the tithe-owners would receive without reduction of any kind for parochial purposes. There seems to be no reason why they should be worse off while the rates remain unredeemed.

We are of opinion that the statute means what it says, that the tithe-owners were to have 6500*l.* a year in lieu of the previous charges, and therefore that the parish is not entitled to reduce the amount as contended upon this appeal.

Our judgment is therefore for the respondents, with costs.

Order of sessions affirmed.

Solicitors for assessment committee: *Baylis & Pearce.*
Solicitors for respondents: *Winter & Co.*

P. B. H.

ASHER *v.* CALCRAFT.

March 15.

Church—Churchwardens, Authority of—Free Seats—Distribution of—Resistance to Churchwarden—Violent Behaviour—23 & 24 Vict. c. 32, s. 2.

Churchwardens of a church with free seats have authority to direct, for the maintenance of order and decorum, in which of those seats certain classes of the congregation may and others may not sit.

A person may be convicted by justices, under 23 & 24 Vict. c. 32, s. 2, of violent behaviour in a church, although such behaviour was in assertion of a bonâ fide claim of right.

CASE stated under 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879, s. 33.

Upon the hearing of an information preferred by the respondent against the appellant under 23 & 24 Vict. c. 32, for violent behaviour in a parish church shortly before the celebration of divine service therein, the appellant was convicted in the penalty of 1*s.* and costs.

It appeared that the respondent was one of the churchwardens for the parish of Ancaster, and was appointed by the parish.

On the church-door, and likewise on a pillar in the body of the church, so placed as to be seen by persons entering the church, was a notice in the following words:—"The seats in

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this church are free: worshippers are invited to take any vacant place." The respondent did not consent to the notice being so placed.

Complaints had been made from time to time of the conduct during divine service of certain young men and boys located in the north aisle, but there was no evidence that the appellant had been one of them. In consequence of this, with a view to regulate the places where the people should sit, the respondent and the other churchwarden, F. M. Bowd, on Sunday, June 27, 1886, were on duty in the church. They stood in the centre aisle in front of the porch.

Respondent went to church about five minutes past six in the evening, and, between a quarter and twenty minutes past, a great many people came into church, and he and his co-churchwarden directed some of them where to go. The church was getting full at that time.

About twenty minutes past six some young men and boys came into the porch. They stopped for a time and then closed up and came into the church quickly, and all acting as it were together, and as if in concert. There were about twelve or fourteen of them. Respondent and the other churchwarden allowed a certain number to go by, and asked some to go into the south aisle, and they all went with the exception of the appellant. Respondent had placed some ladies in the north aisle, which was then nearly full, and wished to place other ladies there, in order to keep the ladies first seated there in countenance. Respondent and the other churchwarden did not wish all the boys to sit together. Respondent being so placed in front of appellant, appellant pushed against respondent, saying: "It is a free church; you must not interfere with me; I shall go where I like." Appellant pushed respondent round, saying there were bills up that it was a free church, and they told him to go where he liked, or something of that sort. Respondent took hold of appellant's arm, and said, "You must please go where we ask you." Appellant refused, and would not give his name, and respondent therefore said he should summon appellant. Appellant then walked out of church. Appellant was going down the middle aisle, where respondent was standing, and refused several

times to give his name. Two people went out, and a lady fainted, respondent believed, owing to the disturbance.

Appellant was not a parishioner, but had been a regular attendant at church for a few previous Sundays, and had never been seen guilty of bad conduct.

There was plenty of room in the part of the church towards which appellant was walking before he was directed to a seat by the respondent.

Mr. F. M. Bowd, the parish schoolmaster, and the other (vicar's) churchwarden—an office which he had held about a fortnight or three weeks—did not know appellant's name, but had seen him at church. He said he saw the appellant (who was one of the young men and boys that came in) enter the church, and, though he might have walked rather fast, he entered in quite an orderly manner. He also said he considered there would not have been any disturbance but for respondent placing himself in front of the appellant. He said boys used sometimes to misbehave themselves when they sat in the north aisle, and that he had arranged with respondent to assist him in seating the parishioners, and thought it desirable to divide the boys in order to prevent further disturbance.

Divine service was celebrated in Ancaster parish church on Sunday evening, June 27, 1886. The celebration commenced at half-past six as usual.

The justices being of opinion that the respondent had authority (under the circumstances disclosed by the evidence) to direct the appellant to take his seat in the south aisle, and that, in forcing his way past the respondent, the appellant had been guilty of violent behaviour, gave their determination against the appellant in the manner before stated. The questions for the opinion of the Court were:—1st. Whether the respondent had by law authority (under the circumstances disclosed by the evidence) to direct the appellant to take his seat in the south aisle? 2nd. Whether the appellant, in forcing his way past respondent, was guilty of violent behaviour?

Cyril Dodd, (with him *Jelf*, *Q.C.*), for the appellant. The justices were wrong in convicting the appellant of brawling, and

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had no jurisdiction to do so, as he was only asserting a bonâ fide claim of right. If not a parishioner, he was a regular attendant at the church, in which the seats were free, and those who attended the service were invited to take any seat they pleased. The justices have not found as a fact that the appellant was guilty of violent or riotous conduct within 23 & 24 Vict. c. 32.

By 5 & 6 Edw. 6, c. 1, s. 2, "every person shall diligently or faithfully (having no lawful or reasonable excuse to be absent) endeavour themselves to resort to their parish church or chapel accustomed . . . . upon every Sunday and holidays upon pain of punishment by the censures of the church." 9 & 10 Vict. c. 59, s. 1, repeals that enactment as to dissenters only, but provides that no pecuniary penalty shall be imposed upon any person by reason of his absenting himself as aforesaid. So there is a statutory obligation, and an absolute right to attend the parish church or place accustomed. Canons of A.D. 1604, give churchwardens power to keep the peace, and to see that persons resort to church, and require the presentment of offenders, but do not authorize churchwardens to assign pews. The only suggestion that they have power to do so is in a summing-up of Rolfe, B., at Nisi Prius in *Reynolds* v. *Monkton*. (1) Their duties are accurately defined by Sir William Scott in *Hutchins* v. *Denziloe and Loveland*. (2) They may prevent indecent conduct during service, but whether they can turn out anyone, except during service, is doubtful: *Worth* v. *Terrington*. (3) The appellant had a right to any unappropriated place in the church, for the church is common to everyone: per Hussey, C.J. (4)

The conduct of the appellant was in assertion of a bonâ fide claim of right, and therefore the justices' jurisdiction was ousted. Of course an absurd or impossible claim of right, although honest, does not oust their jurisdiction: *Watkins* v. *Major*. (5) But the claim of the appellant was reasonable, and asserted with no undue violence. The case is insufficiently stated, and should be remitted for amendment so as to directly raise this question. Moreover the justices have not found that the appellant was

(1) 2 Moo. & R. 384.
(2) 1 Hagg. Cons. 170, at p. 173.
(3) 13 M. & W. 781.
(4) Y. B. 8 Hen. 7, f. 12.
(5) Law Rep. 10 C. P. 662.

guilty of violent or indecent behaviour, assuming the churchwarden was wrong.

W. Graham, for the respondent. The object of 23 & 24 Vict. c. 32, s. 2, was to preserve order in church, and, even if the appellant had the right which he claimed, his forcible assertion of it contravened the Act. But he had no such right, and if the right claimed could not exist in law, the justices might disregard the claim and proceed to convict the offender.

The churchwardens were justified in directing the appellant to go to a certain part of the church. All the pews in a parish church are, by general law and of common right, for the use in common of all parishioners, who are to be so provided with seats as may most conveniently and orderly accommodate all: see 2 Phill. Eccles. Law (ed. 1873), p. 1799. The distribution of seats rests with the churchwardens, as the officers, and subject to the control of the ordinary: *Fuller* v. *Lane*, per Sir John Nicholl (1); *Pettman* v. *Bridger*. (2) It is their duty to maintain order in church.

The churchwardens have even a right to remove a person from one seat to another without unnecessary force, and if the removal can be effected without public scandal or the disturbance of divine service: see *Reynolds* v. *Monkton*, per Rolfe, B. (3); even although service had not begun: *Burton* v. *Henson*. (4)

Cyril Dodd, in reply, referred to *Horsfall* v. *Holland*. (5)

A. L. SMITH, J. The question is whether this conviction for brawling in church can be supported on the facts stated by the justices.

Under 23 & 24 Vict. c. 32, s. 2, any person who shall be guilty of riotous, violent, or indecent behaviour, in any church, whether during the celebration of divine service or at any other time, shall on conviction thereof be liable to a penalty. I agree with the construction of that section suggested by counsel for the respondent, and I think that if a person is de facto guilty of riotous, violent, or indecent behaviour in church, it is no answer

(1) 2 Add. 419, at p. 425.
(2) 1 Phill. 316, at p. 323.
(3) 2 Moo. & R. 384, at p. 385.
(4) 10 M. & & W. 105.
(5) 6 Jur. (N.S.) 278.

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A. L. Smith, J.

to a charge against him under the Act for him to allege that he was setting up a claim of right which he thought he in fact had. The question for the justices in such a case is whether he was guilty of riotous, violent, or indecent behaviour, and not whether he thought he had a right.

The justices found the respondent guilty, assuming the churchwardens were right, and it has been argued that the justices would not have found the respondent guilty assuming that the churchwardens were wrong, and that the conviction cannot therefore be supported. It is said that the churchwardens were wrong, and could not do what they did.

The question is whether they have, for the purposes of the decent conduct of the services in the church, the power of saying in what free seats certain members of the congregation may sit, and others may not sit. I speak of free seats, for in this case we have nothing whatever to do with faculty pews, or anything but free seats. The facts are shortly stated in the case. [The learned judge read them.] I think the appellant was guilty of behaviour which was violent and indecent within s. 2 of the Act.

The case is not one where churchwardens have excluded anybody from the parish church, but they simply, for quiet conduct of the services, directed where certain classes of the congregation should go. Counsel for the appellant admitted that churchwardens have a right to preserve decorum and order in church, and that they might have divided the boys from the girls for the sake of order. Then what difference is there if the churchwardens think fit for the same purpose to direct some of a number of boys to go to one place and some of them to another?

It is well within the scope, power, and authority of churchwardens to direct where a certain class shall go and a certain class shall not go, and, if authority were needed, I am fortified in my opinion by the summing-up of Rolfe, B., in *Reynolds* v. *Monkton* (1), who said, "I think that the churchwardens have a right to exercise a reasonable discretion in directing where the congregation shall sit; and if the defendant used no unnecessary force, he had a right to remove the plaintiff from the pew in question to another seat."

(1) 2 Moo. & R. 384, at p. 385.

That is the well known and familiar law of this country, and consonant with common sense. The justices have found that the appellant insisted on going where he was told not to go, pushed against the respondent, forced his way by pushing the respondent round, and said that he would go where he liked. On that the justices have left two questions to us, and appear to have found that if the churchwarden was doing only what he had a right to do, then the appellant was guilty of violent conduct within s. 2. In my judgment, it is manifest that the churchwarden did only what by law he was entitled to do. It has been argued that the justices had no jurisdiction for there was a bonâ fide claim of right, and they should not have proceeded to determine the case. I fail to see where the bonâ fide right was in this case.

It is said that the appellant was a parishioner, and his counsel asked that the case should be remitted to the justices for them to find the fact. But it was admitted that, apart from any finding, the respondent, even if a parishioner, has no right to any particular seat in church. It was said that he had a right to be in church during service. With such right the churchwarden did not interfere. He said only that if fifteen boys came in concert to attend service part should sit in one place and part in another, and counsel admitted that for decency and order in church the churchwardens may interfere. Even if a bonâ fide claim of right was made there were no facts to support it, so the conviction was right, and I answer the first question put to us in the affirmative; and to the second question, viz., "whether the appellant in forcing his way past the respondent was guilty of violent behaviour," I add "within the meaning of the statute," and I answer that question, so modified, also in the affirmative. The appeal must be dismissed with costs.

GRANTHAM, J. I am of the same opinion. It is unfortunate that there is so little direct authority on the question what are the rights and duties of churchwardens with respect to seating persons in the parish church; but there is ample authority to justify us in coming to the conclusion that a churchwarden has a right, in carrying out his duty of maintaining order and decorum

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in church, to direct persons to sit or not to sit in any particular part of church. I quite agree with what my learned Brother has said as to the right of the churchwarden in this particular place to separate a party of boys. Nothing is more likely to create a disturbance in church than a number of boys getting together. I am of opinion that a churchwarden has a right and duty to seat persons in the particular way most consistent with the convenience of all,—the paramount duty to maintain order by sending some to one side and some to the other. All the other boys who came in to assert their alleged right behaved properly and decently. The appellant was the only one who did not. He claimed a right to sit where he liked, and assaulted the churchwarden, pushing him round. I think the case is clearly within the scope of the Act, that the appellant was guilty of brawling in the sense in which that word is used in the Act, and the justices were right in convicting him; and they have done so independently of the question whether the churchwarden was right or not, for they have found that the appellant in forcing his way was guilty of violent behaviour. Therefore he was found guilty, even if the churchwarden was wrong. The justices did *not* leave it to us to say whether there was any evidence or not of violent behaviour, but found it as a fact.

Conviction affirmed.

Solicitors for appellant: *Hine-Haycock, Bridgman, & Parker.*
Solicitors for respondent: *Gregory & Co.*

J. R.

IN RE MUTTON. EX PARTE BOARD OF TRADE.

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March 14.

Bankruptcy—"Usual and Proper Books of Account" to be kept by Bankrupt, what are—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (*a*).

By s. 28 of the Bankruptcy Act, 1883, the Court shall either refuse an order of discharge, or suspend the operation of the order, on proof that the bankrupt "has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy." Where a bankrupt had kept usual and proper books of account in his business as a hatter, but had omitted to keep any books of account in respect of losses he had sustained through making certain purchases of land in the hope of selling again at a profit:—

Held, that s. 28 only required the bankrupt to keep books of account in the business carried on by him; that he was not bound to keep such books of account as would disclose his financial position otherwise than in respect of such business, and, therefore, that he had not violated the provisions of that section.

APPEAL from a decision of the judge of the Brighton County Court upon an application for the discharge of T. Mutton, a bankrupt.

The facts appearing from the report of the official receiver and from the evidence on the hearing of the application were shortly as follows:—

The debtor carried on business as a hatter at Brighton, and the county court judge found as a fact that this was the only business he carried on. It was admitted that as regarded this business the debtor kept the usual and proper books of account; that they were properly balanced; that a regular profit and loss account was kept, and that his accounts disclosed his business transactions as a hatter, and his financial position, if certain speculations which he had made in house property were excluded. The books kept in his business as a hatter shewed that he had carried on that business at a profit.

Some years before the bankruptcy the debtor derived from his father two properties, one of them being some buildings situated in the rear of the King's Road, Brighton, and the other being land at Rusper, near Horsham. Prior to 1880 he had mortgaged both properties, and in 1880 and subsequently he bought the

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being made bankrupt disclose his true financial position in respect of all transactions within three years of the bankruptcy." I cannot suppose that the legislature intended to impose such terms upon all Her Majesty's subjects. The test is whether or not the debtor carried on a business. If he did, the Act requires him to keep usual and proper books of account shewing his financial position in respect of that business.

CAVE, J. I am of the same opinion. In order to make the bankrupt subject to the provisions of s. 28, sub-s. 3 (*a*), it is necessary to shew that he has omitted to keep such books of account as are usual and proper in the business carried on by him. It must be shewn first that he has carried on some business, and, secondly, that it is usual and proper to keep books of account in that business. Those are the tests applied by the section. It does not apply to business transactions in respect of which it is not usual and proper to keep books of account. It does not apply to any transactions outside the business carried on by the bankrupt. The words, "and as sufficiently disclose his business transactions and financial position," were not intended to add something to the liability imposed by the preceding words, but they were added in order to prevent the bankrupt from saying that he had complied with the section by keeping books of account, when those books were kept in such a way as not to sufficiently disclose his business transactions and financial position.

The questions here, therefore, are whether the bankrupt carried on a business; and if so, whether the business was one in which it was usual and proper to keep books of account. The bankrupt carried on business as a hatter, and also speculated in house property. In respect of his purchases of house property, I think that he did not carry on a business. He was not speculating in the sense that he was buying and selling house property generally for gain. He had property which came to him from his father, and his intention was to develope it by buying adjoining property. I think it is clear that his transactions in that respect did not amount to carrying on a business. It is also clear that he had no knowledge whatever of any books of account which were usual and proper to be kept in respect of his purchases. Ordinarily

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speaking books of account are capable of being kept of transactions of buying and selling land and houses, but here he bought house property and created mortgages to pay for it. What ought he to have entered on the other side of the account? If he had sold any of the property entries to his credit could be made, but he did not sell. I am of opinion that in respect of his purchases of property he carried on no business in which it was usual or proper to keep books of account. I think that the learned county court judge came to the right conclusion, and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor of the Board of Trade.*

W. A.

EX PARTE LESLIE. IN RE LESLIE.

March 14.

Bankruptcy—Receiving Order, Discharge of—Official Receiver, Powers of—Scheme of Arrrangement—Consent of Creditors—Conduct of Debtor—Public Examination—Discretion of Court to refuse Discharge of Receiving Order before Debtor's Public Examination—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 35, 68, 69.

A receiving order having been made against a debtor upon his own petition, his public examination was adjourned; and ultimately, the creditors accepted a scheme of arrangement under which they received less than the full amount of their debts. In an application to have the receiving order discharged, made by the debtor with the concurrence of all the creditors, the official receiver appeared and objected to the discharge of the order until after the public examination had been held, on the ground that he was not satisfied with the debtor's conduct:—

Held, that the official receiver was entitled, under the Bankruptcy Act, 1883, to appear in the application and oppose the discharge of the receiving order; and that the county court judge had a discretion to refuse the discharge.

MOTION by way of appeal from the decision of the judge of the Brighton County Court, refusing an application by the debtor, Leslie, to discharge a receiving order made against him on May 31, 1886.

The receiving order was made on the debtor's own petition, and June 24, 1886, was appointed for his public examination. Upon that day the examination was adjourned until August 12. Upon August 4, it was unanimously resolved by a meeting of

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CAVE, J. I am of the same opinion. In order to make the bankrupt subject to the provisions of s. 28, sub-s. 3 (*a*), it is necessary to shew that he has omitted to keep such books of account as are usual and proper in the business carried on by him. It must be shewn first that he has carried on some business, and, secondly, that it is usual and proper to keep books of account in that business. Those are the tests applied by the section. It does not apply to business transactions in respect of which it is not usual and proper to keep books of account. It does not apply to any transactions outside the business carried on by the bankrupt. The words, "and as sufficiently disclose his business transactions and financial position," were not intended to add something to the liability imposed by the preceding words, but they were added in order to prevent the bankrupt from saying that he had complied with the section by keeping books of account, when those books were kept in such a way as not to sufficiently disclose his business transactions and financial position.

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Appeal dismissed.

Solicitor for appellants: *Solicitor of the Board of Trade.*

W. A.

EX PARTE LESLIE. IN RE LESLIE.

March 14.

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Held, that the official receiver was entitled, under the Bankruptcy Act, 1883, to appear in the application and oppose the discharge of the receiving order; and that the county court judge had a discretion to refuse the discharge.

MOTION by way of appeal from the decision of the judge of the Brighton County Court, refusing an application by the debtor, Leslie, to discharge a receiving order made against him on May 31, 1886.

The receiving order was made on the debtor's own petition, and June 24, 1886, was appointed for his public examination. Upon that day the examination was adjourned until August 12. Upon August 4, it was unanimously resolved by a meeting of

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the creditors that a proposal for a scheme of arrangement submitted by the debtor should be entertained. Subsequent adjournments of the public examination until February 10, 1887, took place, and in the meantime negotiations were proceeding between the debtor, or his solicitor, and the creditors in order to carry out the debtor's proposal.

On February 11 the debtor presented a petition in the county court praying that the receiving order might be rescinded. The petition stated that fifty-two creditors in all had proved against the estate; that forty-three of those creditors had by indentures duly executed by them assigned their debts to A. E. Munns, who had assented in writing to the prayer of the petition; that of the remaining nine creditors who had proved their debts, the claims of seven had been satisfied and discharged; that the proof of one had been withdrawn, and that the other remaining creditor, who had a preferential claim for poor-rates, had been satisfied; that the fifteen creditors who had not proved had also assigned their debts to Munns, and that he assented to the prayer of the petition on behalf of those fifteen creditors. Upon the hearing of the application the official receiver objected to the receiving order being discharged until after the debtor had been publicly examined, stating that he was not satisfied with the debtor's conduct.

The county court judge took time to consider his decision, and ultimately refused the application to rescind the receiving order. In giving judgment he said that the creditors would seem to have privately accepted so many shillings in the pound in respect of their debts, and to have agreed as part of the arrangement to support an application for the discharge of the receiving order.

The debtor appealed.

Winslow, Q.C., and *Yate Lee*, for the appellant. The county court judge had no discretion to refuse to discharge the receiving order, there being no ground for suspecting any fraud upon any creditor, and all the creditors having assented to the discharge. The old practice in this respect has not been altered by the Bankruptcy Act, 1883, and should be followed. That practice began by an order of the Lord Chancellor in 1818; and

it was continued by r. 263 of the General Rules of 1870, made under the Bankruptcy Act, 1869. The Court always cancelled the appointment of a receiver where all the creditors assented; and by r. 353 of the Bankruptcy Rules, 1886, when no other provision is made by those rules, or by the Act of 1883, "the present law, procedure, and practice in bankruptcy matters shall, in so far as applicable, remain in force." The principle contended for has been applied since the passing of the Act of 1883: *Ex parte Wemyss, In re Wemyss.* (1)

[MATHEW, J. Under s. 18 the Court has power to consider a proposed composition or scheme of arrangement, though all the creditors assent to it. Why should a debtor who has presented a petition for a receiving order be placed in a better position?]

Reading the whole of s. 18 the object was to get payment for the creditors. If all are paid the discharge should be granted. Here there is no scheme to enforce, all the debts having been bought up. If there be a discretion it must be exercised in favour of the creditors, not of the official receiver. The debtor ought not to be compelled to go through his public examination before he can obtain possession of property which in equity belongs to him when the creditors have assented to the receiving order being rescinded.

Next, if the county court judge had a discretion, there were no facts before him upon which to exercise it. He acted upon the mere statement of the official receiver, who had no locus standi in the matter of the application. The official receiver's duty is at an end when he has made his report: *Ex parte Reed, In re Reed.* (2)

[They also cited *Ex parte Jones, In re Jones* (3), and *Ex parte Carr, In re Carr.* (4)]

Sir E. Clarke, S.G. (*Muir Mackenzie* with him), for the official receiver. The decision in *Ex parte Wemyss, In re Wemyss* (1), shews that the county court judge had a discretion to refuse to annul the receiving order. It was his duty to protect the creditors against themselves: *Ex parte Campbell, In re Wallace.* (5)

(1) 13 Q. B. D. 244.
(2) 17 Q. B. D. 244.
(3) Law Rep. 3 Ch. 144.
(4) W. N. Dec. 4, 1886, p. 187.
(5) 15 Q. B. D. 213; judgment of Brett, M.R., at p. 217.

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It is important that the Act of 1883 should be carried out in its double intention, namely, to guard the interest of the public as well as to secure that a debtor, whose conduct has not been the subject of complaint, should be released from all his liabilities.

The official receiver was entitled to appear, and take the course he did take, in the matter of the debtor's application. By ss. 68 and 69 the Act imposes upon him general duties in relation to the conduct of the debtor and the administration of his estate; and by s. 18, sub-s. 3, when a scheme or composition is proposed, it can only be confirmed at a meeting of the creditors held after the debtor's public examination. The object of the Act is that the public examination, in which the conduct of the debtor may be ascertained and considered, should as a rule be held.

Winslow, Q.C., replied.

MATHEW, J. I am of opinion that this appeal should be dismissed, on the grounds that the county court judge had a discretion to refuse to discharge the receiving order, and that he rightly exercised his discretion. The application was made in the county court under s. 102 of the Bankruptcy Act, 1883, which enables every court having jurisdiction in bankruptcy to decide all questions, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice. It was argued, in substance, before us that, all the creditors having agreed to the compromise effected on behalf of the debtor, and by so agreeing having disposed of any necessity that the bankruptcy should continue, and having in effect decided that the receiving order should be discharged, the county court judge had no jurisdiction to interfere with the exercise of their discretion, and no power to do otherwise than rescind the receiving order. It was said that both under the old and the new bankruptcy practice that result must follow upon the creditors' decision. But the new Act has introduced a great extension of the powers of the Court to interfere in these respects. Sect. 28 enables a bankrupt to apply for his discharge, but provides that the application shall

not be heard until after his public examination has been concluded. It is clear, I think, that the Act has made provisions on public grounds for the public examination of the debtor. There has been an attempt here to avoid those provisions. It was contended that the official receiver had no locus standi, and no right to intervene, in the application, but by ss. 66, 68, and 69, the official receiver is to be an officer of the court to which he is attached; his duties are to have relation to the conduct of the debtor, and it shall be his duty to investigate the conduct of the debtor and to report to the Court, stating whether there is reason to believe that the debtor has committed any act which would justify the Court in refusing an order for his discharge. The official receiver has, I think, a general power to bring before the Court a statement of his views with reference to the conduct of the bankrupt and the propriety of further investigation before any step is taken which would release the debtor from his position as a bankrupt. It was said that the county court judge had no materials before him upon which to refuse the application, and that in refusing it he substituted the mere statement of the official receiver for the real grounds which ought to have existed. But we must take the judgment as it stands, and I am of opinion that the judge had plenty of opportunity of judging whether the official receiver's view was right. The only answer made to the official receiver's statement that he was not satisfied with the debtor's conduct was that the official receiver had no right to interfere, and the judge may have thought that that answer gave some ground for supposing that the official receiver was right in his view. I think it would be a most unfortunate result if we were compelled to frustrate the elaborate precautions of the Bankruptcy Act taken in the public interest by holding that a county court judge has no discretion to refuse to rescind a receiving order under such circumstances as these.

CAVE, J. I am of the same opinion. I agree that it would be a public misfortune if we were compelled to any other decision in this case. I have no doubt that the county court judge had a discretion to refuse the application for a discharge of the receiving order. Sect. 35 has the nearest application to this case.

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Cave, J.

That section provides that, "where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication." That which is sought to be annulled here is not an adjudication but a receiving order, but *Ex parte Wemyss, In re Wemyss* (1), decides that the same principles apply to a receiving order. Applying the provisions of s. 35 to a receiving order, it is clear that in the present case the conditions indicated by that section are not satisfied because the debts were not paid in full. I therefore think that the county court judge had jurisdiction to refuse to rescind the receiving order. The material facts shew that after the receiving order was made upon the debtor's own petition, the proceedings dragged on and the public examination was from time to time adjourned, whilst in the meantime the debtor's friends were buying up his debts. The debtor himself, therefore, took advantage of the Bankruptcy Act to place himself in the position of a person against whom a receiving order had been made. Having thereby been enabled to get rid of his creditors and to pay them less than the full amount of their debts, he now asks the Court to annul the receiving order and allow him to escape the consequences of filing the petition, namely, that his affairs would be investigated, and his conduct inquired into, by the official receiver. He desires to take the benefit of the Act without being subject to the burden imposed by it. I think that he is not entitled to do this. I am of opinion that the county court judge rightly exercised his discretion.

Appeal dismissed.

Solicitors for appellant: *Munns & Longden.*
Solicitors for respondent: *Solicitor of the Board of Trade.*

(1) 13 Q. B. D. 244.

W. A.

[IN THE QUEEN'S BENCH DIVISION AND COURT OF APPEAL.]

1887
March 23.

ADAMS *v.* BATLEY.
COLE *v.* FRANCIS.

Practice—Interrogatories—Action for Penalties, what is—3 & 4 *Wm.* 4, *c.* 15, *s.* 2.

By 3 & 4 Wm. 4, c. 15, s. 2, if any person shall, during the continuance of the sole liberty of representing a dramatic piece, represent such piece without the consent of the author, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.* :—

Held, that this section did not impose a penalty upon the offender so as to preclude the plaintiff, in an action to recover the specified amount, from administering interrogatories to him.

Decision of the Queen's Bench Division affirmed.

MOTIONS in the Queen's Bench Division by way of appeal from orders made at chambers in two actions.

The appeals were heard together.

In each action the plaintiff sued for the infringement of his right to the sole liberty of representing or performing a musical composition, and claimed as damages the sum of 40*s.* under s. 2 of 3 & 4 Wm. 4, c. 15. In *Cole* v. *Francis* the plaintiff subsequently amended his statement of claim by adding alternative claims for "the full amount of the benefit or advantage arising from such representations or performances," and for "the full amount of the injury or loss sustained by the plaintiff therefrom." The plaintiff in each action applied for leave to administer interrogatories. In *Adams* v. *Batley* leave was refused by Huddleston, B., and in *Cole* v. *Francis* leave was granted by Pollock, B.

The plaintiff in *Adams* v. *Batley* and the defendant in *Cole* v. *Francis* appealed.

1887. March 8, 12. *T. T. Fillan*, for the plaintiff in both actions. The amount of 40*s.* given by the Act is not a penalty, but damages. This sum is called "damages" by Lord Hatherley in *Chatterton* v. *Cave*. (1)

(1) 3 App. Cas. 483.

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Shortt, for the defendant in *Adams* v. *Batley*. This sum of 40*s.* is a penalty, and it is so called by Lord O'Hagan in *Chatterton* v. *Cave* (1), and by all the judges in the Court of Appeal in *Wall* v. *Taylor*. (2) In the latter case the Master of the Rolls says: "Sect. 2 of that Act meant to give him a further remedy, that is to say, a penalty of 40*s.* for each such representation, or damages amounting to the amount of the benefit from such representation." (3) Damages are the sum to be ascertained by a jury as the amount of the damage suffered. It is true that the Act does not call this sum of 40*s.* a penalty, but the mere presence or absence of the word "penalty" in the Act is immaterial: the test is whether the sum is in substance a penalty. It is a punishment to the defendant rather than compensation to the plaintiff, and the Act itself distinguishes it from the assessment of damages. By s. 2: "Every such offender shall be liable for each and every representation to the payment of an amount not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages . . . . to be recovered, together with double costs of suit," by the author or proprietor of the copyright. The words "whichever shall be the greater damages" refer only to the two last preceding alternatives. If the legislature had intended to treat the payment of "not less than 40*s.*" as damages, and so include all three alternatives, the expression should have been "greatest damages." This being an action to recover penalties interrogatories cannot be administered to the defendant: *Martin* v. *Treacher*. (4)

P. B. Hutchins, for the defendant Francis. This sum is throughout described as a penalty in *Duck* v. *Bates* (5) and *Lee* v. *Simpson*. (6) By similar Acts for the protection of copyright in engravings (8 Geo. 2, c. 13, s. 1; 7 Geo. 3, c. 38, s. 5), and paintings, drawings, and photographs (25 & 26 Vict. c. 68, ss, 7, 8), the person injured is given the right to recover "penalties." This Act is highly penal, for the plaintiff need not aver

(1) 3 App. Cas. 483.
(2) 11 Q. B. D. 102.
(3) Ibid. p. 107.
(4) 16 Q. B. D. 507.
(5) 12 Q. B. D. 79; 13 Q. B. D. 843.
(6) 3 C. B. 871.

or prove that the plaintiff knowingly invaded his right: *Lee* v. *Simpson.* (1)

[He also cited *United States of America* v. *McRae* (2); *Wools* v. *Walley* (3); *Lyell* v. *Kennedy* (4); *Hunnings* v. *Williamson.* (5)]

DAY, J. In these two motions we have to determine whether in an action under 3 & 4 Wm. 4, c. 15, s. 2, to recover the sum of 40*s.* as therein provided, interrogatories are admissible on behalf of the plaintiff. In one of these actions the interrogatories were disallowed by Huddleston, B., in chambers, on the ground that the action was for a penalty; in the other action they were allowed by Pollock, B., in chambers, who was of opinion that the action was not a penal action. I think that the decision of Pollock, B., was right. I am clearly of opinion that this is not a penal action. It has been well said that the use of the term "penalty" is not essential to make a particular sum a penalty. If the Court can ascertain that a particular sum is really not in the nature of a penalty it will not allow that sum to be recovered, but only damages; and if a particular sum which is expressly called "liquidated damages" is really a penalty that sum cannot be recovered as liquidated damages. The distinction between a penalty and liquidated damages has always been recognised. Here we have to construe an Act of Parliament, not a contract, but in construing it we must apply the same rudimentary distinctions. The Act creates property in dramatic compositions and provides for compensation to the owner of such property when his rights have been infringed. By s. 2, "every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.*, or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author." Much stress has been laid upon the use of the word "offender" in this section, as shewing that this sum of 40*s.* is a penalty. This word is only used here as a convenient expression, and is in no way meant

(1) 3 C. B. 882, 883.
(2) Law Rep. 3 Ch. 79.
(3) 1 Anstr. 100.
(4) 8 App. Cas. 217.
(5) 10 Q. B. D. 459.

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DAY, J.

to designate a criminal. It is meant to designate any person who violates the private right of property thereby created, and is used in the Act as a short and convenient expression for such person. An "offender" is to be liable to the payment of an amount not less than 40*s.*, *or* the full amount of the benefit arising from such representation, *or* the injury or loss sustained by the plaintiff, "whichever shall be the greater damages." It is clear that the section is speaking of damages in each of the three cases because the plaintiff is to recover "whichever" he likes. The first amount which the offender may be made to pay is not necessarily the measure of the actual damage; neither is the second amount; but the third amount is truly so; they are all three, however, in the nature of damages. It is scarcely ever possible for the owner of the right of sole dramatic representation to prove by evidence the precise amount of the damage he has suffered, and therefore the statute has reasonably provided various measures of damages, any one of which he may adopt. If he cannot prove the actual damage he has suffered he may prove the amount of profit which the offender has made and recover that as damages; and, if he cannot prove that, he may say that his damages are 40*s.*, and recover that amount. I am of opinion that this sum of 40*s.* is not a penalty.

WILLS, J. I am of the same opinion. I quite agree with what my Brother Day has said about the meaning of the word "offender" used in the Act. This word is used in a section which expressly gives damages, and in relation to those damages. It is argued that this sum of 40*s.* is a penalty because of the alternative remedies given by the Act; that the first amount which may be recovered is a penalty, and that the second and third are not penalties. I cannot agree with this argument. It is said that the word "whichever" applies only to the second and third amounts, but I think that it must apply to all three. The second amount is not strictly damages, but it is admitted that this word applies to that amount. The Act gives the plaintiff three measures of damages, and says that he may recover whichever is the best for him according to the evidence which he can adduce. We are told that there are authorities against this

construction of the Act, but I think that none of the cases cited are so. The words of the Master of the Rolls in *Wall* v. *Taylor* (1), were not meant to be a strict exposition of this section of the Act. In my opinion the sum of 40*s.* is a statutory assessment of the damages in the case of small injuries, where it is difficult or impossible to prove greater damages. The decision in *Powell* v. *Head* (2) is an absolute authority for this construction of the Act. In that case Jessel, M.R., held that the plaintiff was entitled to recover one half of the sum of 40*s.*, which decision must have proceeded upon the ground that that sum was liquidated damages and not a penalty. The cases upon forfeiture which have been cited are not in any way applicable to this case.

Order rescinded in *Adams* v. *Batley*.
Order affirmed in *Cole* v. *Francis*.

The defendant in *Adams* v. *Batley* appealed.

1887. Mar. 23. *Shortt*, for the appellant, argued as in the Court below.

T. T. Fillan, for the respondent, was not heard.

LORD ESHER, M.R. Whether it be strictly correct to call this sum a penalty, or liquidated damages, or a forfeiture, or whatever may be the exact term which ought to be applied, I feel sure that it is not a payment of money coming within the doctrine which prevented Courts of Equity from allowing discovery by way of interrogatories administered to the defendant; nor is the case brought within any rule laid down by the Courts of Common Law. It is not a payment of money coming within the same class of payments as in *Martin* v. *Treacher*. (3) I think it is clear that this payment is treated in the Act as a payment by way of damages and not by way of penalty. It is imposed not as a punishment upon the defendant, but as compensation to the plaintiff.

Sect. 2 provides that every offender shall be liable for each representation to the payment of an amount "not less than

(1) 11 Q. B. D. 102. (2) 12 Ch. D. 686.
(3) 16 Q. B. D. 507.

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Lord Esher, M.R.

forty shillings." If that payment is a penalty, who is to settle the amount—ought the jury to settle it; and if so, upon what considerations? Are they to look at the conduct of the defendant; or upon what are they to act? I can see no characteristic of a penalty in this payment. The section proceeds, "or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages." It was argued that the words "whichever shall be the greater damages" referred only to the two last alternatives given to the plaintiff, and that, if those words had been intended to refer to all the three alternatives, the expression would have been "whichever shall be the greatest damages." I think that that criticism is hypercritical. The expression "greater damages" is at most a mere grammatical slip. In my opinion the legislature in using that expression had in mind all the three alternatives, and intended to enable the plaintiff to recover as damages an amount of not less than 40*s.* in respect of each representation, or the full amount of the benefit or advantage derived by the defendant from the representation, or the injury or loss sustained by the plaintiff therefrom. If that be the true view, the Act itself speaks of the first alternative liability as damages, and therefore treats the payment of an amount not less than 40*s.* as a payment by way of damages. Sect. 2 also provides that the damages may be recovered "together with double costs of suit." I know of no instance where by the provisions of an Act of Parliament a penalty can be recovered together with double costs of suit. I am therefore of opinion that this case is not brought within any rule of law which prevents interrogatories being administered to the defendant. *Martin* v. *Treacher* (1) only establishes that there is no rule of law or ethical principle to prevent interrogatories being administered in this class of cases, except the rule which is founded on the old doctrine of Courts of Equity that they would not assist a common informer to obtain discovery. I do not say that the decisions of the Courts of Equity have not gone further, but that was the foundation of the doctrine. Cases have been cited in which judges have used the word "penalty" in

(1) 16 Q. B. D. 507.

describing similar payments to this, but the use of that word, when the question of the right to interrogate the defendant was not before the Court, does not make the payment a penalty for the purpose of deciding that question.

I am of opinion, therefore, that this is not a penalty so as to bring the case within the rule that in actions for penalties interrogatories should not be allowed to be administered to the defendant. This appeal must therefore be dismissed.

BOWEN and FRY, LJJ., concurred.

Appeal dismissed.

Solicitor for plaintiff in both actions: *J. Grayston.*
Solicitors for defendant, Batley: *Dangerfield & Blythe.*
Solicitor for defendant, Francis: *H. M. Pike.*

W. A.

VEALE AND ANOTHER *v.* THE AUTOMATIC BOILER FEEDER CO., LIMITED.

March 25.

Practice—Writ—Special Indorsement—Statement of Claim indorsed—Date of Delivery—Order III., r. 6, *App. C., sect.* 4; *App. A., Form* 2.

A writ specially indorsed with a statement of claim need not have the word "Delivered" nor the date of delivery at the end of such statement of claim.]

MOTION on appeal from an order of Huddleston, B., at chambers, affirming an order of a master setting aside a judgment.

On December 8, 1886, the plaintiff issued a writ in the Form No. 2 of App. A of the Judicature Acts and Rules, and with an indorsement of a statement of claim for work and labour done, of which the particulars were—

1884, Dec. 20, to 1885, March 14.	To account for printing between these dates	£20 9 0.

The words "Delivered the —— day of ——, 18—," did not appear at the bottom of the claim. On December 9, 1886, the writ was served, and on December 16, 1886, the defendants

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entered an appearance. The writ being specially indorsed as above, no statement of claim was delivered. On January 18, 1887, the defendants, having delivered no statement of defence, judgment in default thereof was signed against them. On February 3, 1887, they applied to the master to set aside the judgment, and the order appealed from was made on the ground that the date of the delivery did not appear on the statement of claim indorsed on the writ of summons in accordance with the form in App. C., s. 4.

T. Willes Chitty, for the plaintiffs. The judgment was regular. The writ was specially indorsed in the form prescribed by App. A., No. 2, which does not contain the word "delivered," or a place for the date of delivery, at the end of the statement of claim indorsed. A writ is not delivered, but served. The indorsement, although headed "Statement of Claim," is not a pleading to which the word "delivered" would be appropriate.

Macaskie, for the defendants. Unless the writ was specially indorsed in proper form the plaintiffs were not entitled to sign judgment for want of defence, but should have delivered a statement of claim: Order XX., r. 1. The writ was not specially indorsed. A special indorsement "shall be to the effect of such of the Forms in App. C., s. 4, as shall be applicable to the case": Order III., r. 6. Those Forms have the word "delivered," with a place for the date of delivery. But the fact and date of delivery does not appear at the end of the claim indorsed on the present writ. The plaintiffs must contend that the writ was a statement of claim, that is, a pleading. But if a statement of claim, "it shall be marked on the face with the date of the day on which it is delivered:" Order XIX., r. 11.

HAWKINS, J., after stating that the affidavits shewed no grounds on the merits of the case for setting aside the judgment, said: As to the other objection, the action is brought by a writ of summons tested on December 8, 1886. An appearance was duly entered. No statement of defence was delivered within the proper time. By Order XXVII., r. 2, "if the plaintiff's claim be only for a debt or liquidated demand, and the defendant does

not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs." The plaintiffs say that their claim was only for a debt, that the defendants did not deliver a defence, and therefore the plaintiffs are entitled to judgment by default. The defendants contend that the judgment signed should be set aside because the words "Delivered the —— day of ——, 18—," were not put underneath the statement of claim according to the provisions of App. C., s. 4. It is true that the form there given has the word "delivered" at the end of it. The question is whether that is an essential part of a writ specially indorsed. By Order III., r. 6, "in all actions where the plaintiff seeks only to recover a debt or liquidated demand" arising as therein stated, "the writ of summons may . . . . be specially indorsed with a statement of his claim . . . . such special indorsement shall be to the effect of such of the forms in App. C., s. 4, as shall be applicable to the case."

Before turning to App. C., it is well to refer to App. A., which gives forms of writs of summons, and to observe that No. 2, the form of a specially indorsed writ, does not require the word "delivered" nor the date of delivery to be indorsed, but only something to be indorsed on the writ after service by the person who serves the writ. Then Order XIX., r. 5, enacts that "the forms in Appendices (C.), (D.), and (E.), when applicable, . . . shall be used for all pleadings, and where such forms are applicable and sufficient, any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be." Now I turn to App. C., s. 4, relied on by the defendants, which relates to "actions included in Order III., r. 6, classes A, B, C, D, E, and F," and Form No. 1 runs: "The plaintiff's claim is for the price of goods sold and delivered." Then particulars and amounts are set out, and, at the end, the place of trial, and the word "delivered." That is, a form of claim is to be delivered. In the present case no form of claim is to be delivered at all, but the special indorsement on the writ is in place of a form of claim, and although it is practically the form to be used where separate statements of claim are made, I do not think it essential that the

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Hawkins, J.

word "delivered" should be on the back of the writ. I cannot see any object in having it there. No doubt the date of the issue of the writ should be stated on it before service, but a man knows when a writ is served on him, and if it were necessary to state the date of service before serving it the process server would have to carry a pen and ink and insert the date at the time of effecting service. He might as well be required to fill up on the spot the memorandum of service. Moreover, one does not speak of delivering a specially indorsed writ, but of serving it. The objection is without substance, and we should be yielding to a technicality if we allowed it.

CAVE, J. I am of the same opinion. Although a master and the learned judge at chambers took a contrary view, it seems to me a clear case, and I think their decision may have been arrived at from their attention not having been called to App. A., Form No. 2. This writ is exactly in that form, which requires no date of delivery. What is there elsewhere that requires it? App. C., s. 4, gives a form meant to serve a double purpose—not only as a short statement to be indorsed on a writ, but also as a statement of claim to be delivered separately. Where served as a statement of claim indorsed on the writ, then it really comes into the form of specially indorsed writ in App. A. No. 2, and as that contains no word "delivered" or date of delivery, none need be put in; but where used under App. C., s. 4, as a separate statement of claim, then it takes the place of a pleading, and not an indorsement, and comes within the provision that all pleadings shall bear the date of delivery. So the form is perfectly proper when used as a statement of claim, and perfectly proper when used as a special indorsement on a writ. That construction reconciles everything, and then App. A., Form No. 2, appears to be a good form which would otherwise have been a mere trap and misleading.

Appeal allowed.

Solicitors for plaintiffs: *Harvey & Capron.*
Solicitors for defendants: *Beall & Co.*

J. R.

PERCIVAL *v.* PEDLEY.

1887
April 1.

*Practice—County Court—Action remitted for Trial—Jurisdiction—Reduction of Claim by Payment or admitted Set-off—*30 & 31 *Vict. c.* 142, *s.* 7—*Admission by Plaintiff.*

By 30 & 31 Vict. c. 142 (County Courts Act, 1867), s. 7, where in any action of contract brought in any of the superior Courts of Common Law the claim indorsed on the writ does not exceed 50*l.*, or "where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds," the defendant may apply to a judge at chambers who may order the action to be tried in the county court.

Held, that the section applies where a payment or set-off reducing the claim below 50*l.* appears on the writ to be admitted by the plaintiff, although such payment or set-off is not also admitted by the defendant.

APPEAL from an order made by Huddleston, B., at chambers, rescinding an order of a master for the transfer of the action for trial in a county court.

The writ was specially indorsed with a claim for 89*l.* 7*s.* 6*d.* for money paid by the plaintiff to the use of the defendant, and credit given for 50*l.* 12*s.* 4*d.*, moneys received by the plaintiff, leaving a balance of 38*l.* 15*s.* 2*d.*

Application having been made to remit the action to the county court, and also under Order XIV. for leave to sign judgment, affidavits were made by the plaintiff and the defendant respectively, the defendant denying all liability.

The master made an order under 30 & 31 Vict. c. 142, s. 7, that the action being for an amount reduced by "admitted set-off" to a sum not exceeding 50*l.* should be tried in the county court; on appeal Huddleston, B. rescinded the order on the ground that there was no power under the Act to make it, as the defendant had not in his affidavit admitted the set-off.

The defendant appealed.

J. Lawson Walton, for the defendant. By the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 7, where in an action of contract brought in a superior court of common law the claim indorsed on the writ does not exceed 50*l.*, or "where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty

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pounds," the action may be sent to be tried in the county court. The claim in the present case is "reduced by payment" to a sum below 50*l*. Although s. 7 contains the words "admitted set-off" it does not require an "admitted" payment. The plaintiff has so shaped his claim as to give jurisdiction. The learned judge at chambers had jurisdiction, and should have exercised it by transferring the action.

James Fox, for the plaintiff. The credit given on the writ cannot be treated as payment. It is a set-off. But it is not admitted by the defendant, and therefore is not an "admitted set-off" within s. 7, which means a set-off admitted by both parties. The case is not one for the county court, and so the learned judge at chambers seems to have thought. It is complicated, and questions of law may arise. The defendant will not suffer any hardship from the case being tried in the superior court; for, if the amount recovered is below 50*l*., the plaintiff will only get county court costs.

There is no decision on the words "admitted set-off" in s. 7. But in *Woodham* v. *Newman* (1) the Court of Common Pleas held that a claim exceeding 20*l*. reduced by set-off to a sum less than 20*l*. was not within the jurisdiction of the county court under 9 & 10 Vict. c. 95, s. 58, as a debt on a balance of account, and in *Avards* v. *Rhodes* (2), where the particulars of demand stated a debt of 57*l*. and admitted a set-off of 15*l*., but no evidence was offered to shew that the parties had agreed to treat the amount of the set-off as part payment, it was held on 9 & 10 Vict. c. 95, s. 63, that the county court had no jurisdiction.

MATHEW, J. I think that the order of the learned judge at chambers should be reversed, and that the appeal must be allowed. I am satisfied that my brother Huddleston acted under the impression that he was precluded by the Act of Parliament from making the order to transfer the action to the county court, and that he did not refuse it in the exercise of his discretion. I cannot suppose that he thought the case was one of such a character that the county court judge could not deal with it.

The question arises on the construction of the Act of Parlia-

(1) 18 L. J. (C.P.) 213. (2) 22 L. J. (Ex.) 106.

ment, is this a case of admitted set-off? Counsel for the plaintiff says that it is not, because the defendant does not admit the set-off for which the plaintiff gives him credit, and it is argued that unless there is an agreement between the plaintiff and defendant as to the set-off it is not admitted by both. But I am clearly of opinion that s. 7 means payment or set-off admitted *by the plaintiff*; because otherwise the plaintiff might make his claim for a sum far above 50*l.*, give credit for a set-off which he knew the defendant would not admit, reducing the claim below 50*l.*, and thereby enable himself to proceed in the superior court. Or again he might claim, say 60*l.*, admitting a set-off of 50*l.*, yet if the defendant did not admit the alleged amount of set-off, but insisted that it should be 51*l.*, the case could not be transferred. That cannot have been the meaning of the provision. I think the learned judge at chambers had jurisdiction to transfer the action, and that it should be transferred to the county court.

CAVE, J. I am of the same opinion. The words of 30 & 31 Vict. c. 142, s. 7 are, "where in any action of contract brought of commenced in any of Her Majesty's superior courts of common law, the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced"—I read those words as meaning reduced on the writ—"by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds," the defendant may apply to have the action tried in the county court. Nothing is said about any necessity for the defendant to admit that the amount for which the set-off is claimed is the exact amount of set-off to which he is entitled; but where the balance alleged to be due from him does not exceed 50*l.* he may apply for an order to have the action tried in the county court. I agree that the section gives jurisdiction; and I consider the learned judge had power to order the transfer, and that such order should have been made.

Appeal allowed.

Solicitors for plaintiff: *Mozley & Dennison.*
Solicitors for defendant: *Fallows & Rider.*

J. R.

1887
March 15.

THE QUEEN *v.* THE COUNTY COURT JUDGE OF ESSEX AND CLARKE.

*County Court—Judgment Debt—Interest—*1 & 2 *Vict. c.* 110, *s.* 17.

A county court judgment debt carries interest under 1 & 2 Vict. c. 110, s. 17.

RULE calling on the judge of the County Court of Essex and Arthur Clarke to shew cause why a prohibition should not issue to prohibit them from further proceeding upon an order amending the judgment in an action in the county court between Clarke as plaintiff, and W. E. P. Cotton, and Harriet E. Cotton, his wife, defendants, and ordering that the plaintiff should be at liberty to issue execution for the sum of 6*l.* 10*s.* and costs.

It appeared that the plaintiff recovered judgment in 1880 in the county court against Cotton and his wife for 26*l.* 18*s.*, which was ordered to be paid on April 27, 1880.

On June 19, 1886, that sum of 26*l.* 18*s.* was paid into the county court.

The defendant Cotton died, and on July 17, 1886, the plaintiff obtained an order in the county court directing the judgment to be amended by substituting the name of the female defendant as administratrix for the name of her husband in the judgment, and ordering payment of 6*l.* 10*s.* interest at the rate of 4*l.* per cent. per annum on the amount of the judgment debt from April 27, 1880, the date of payment so ordered, up to June 19, 1886, when the judgment debt was paid into court; and giving the plaintiff leave to issue execution for the sum of 6*l.* 10*s.*, with costs of the application.

1887. March 8. *S. Lynch*, shewed cause. The county court judge had jurisdiction to order payment of interest on the judgment. The county court is a court of record. By 1 & 2 Vict. c. 110, s. 17, "every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment . . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

The terms of the section are general, "every judgment debt," and include judgments entered in the county court.

R. V. Williams, in support of the rule. Interest cannot be given on a judgment in the county court, because 1 & 2 Vict. c. 110, s. 17, does not apply. That Act passed before the first of the County Court Acts, and the county court was not then a court of record. The statutes governing the county courts are framed on the assumption that the debts therein recoverable will be paid by small instalments, and although those Acts, and the rules and forms made under them, have been repeatedly amended, there is no trace in them of any provision for interest on judgments. See 9 & 10 Vict. c. 95, ss. 94 and 95. The form of fi. fa. in the superior Court mentions interest, but the form of fi. fa. in the county court does not. See County Court Rules, 1886, Order XXV., Form 164. It would be impracticable to provide for interest on county court judgments, as the calculation of interest from time to time on small instalments would be troublesome, and the amount of interest too trifling for consideration.

Cur. adv. vult.

1887. March 15. The judgment of the Court (Mathew and Cave, JJ.) was delivered by

CAVE, J. The only question in this case is whether the judgment of a county court carries interest? By the 1 & 2 Vict. c. 110, s. 17, it is enacted that every judgment debt shall carry interest at the rate of 4 per cent., from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. County courts, as we now know them, were established by the 9 & 10 Vict. c. 95. By s. 3 of that Act every court held under the Act is to be a court of record. By s. 74 the judge is empowered to try the cause in a summary way and give judgment. By s. 94, whenever the judge makes an order for payment of money, the amount is recoverable, in case of default, by execution; and the clerk of the court is to issue a writ of fi. fa. to the high bailiff who is thereby directed to levy the money so ordered to be paid together with the costs of execution; but nothing is said about

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Cave, J.

interest. By s. 109 the clerk of the court is to indorse on every warrant of execution the sum of money and costs adjudged, with the sums allowed as increased costs for the execution of the warrant; and if the debtor pays the amount, together with the authorized fees, execution is to be suspended. Here, again, no mention is made of interest. By Order XXV., r. 11, of the County Court Rules of 1886, the registrar is to deliver to the bailiff with the warrant a notice according to Form 163, which the bailiff is to deliver to the debtor. This formulates the amount of the judgment costs and fees, but no mention is made of interest. No point was made as to the mode of proceeding in the county court, the only point being whether the judgment in a county court does or does not carry interest.

The 1 & 2 Vict. c. 110, was passed for the purpose of extending the remedies of creditors against the property of debtors. Sect. 17 is perfectly general; and no reason was given to us why it should not apply to a judgment recovered in a county court. Since the passing of the 9 & 10 Vict. c. 95, the jurisdiction of the county court has been simplified and extended in many ways; and it is difficult to understand why a suitor who is practically compelled to bring, or at his option brings, his suit in the county court, should be deprived of a right which he would have if he sued in the superior Court. In our opinion, those who contend that a judgment debt in the county court is excluded from the operation of 1 & 2 Vict. c. 110, s. 17, should produce some express provision to that effect in the County Court Acts, or at all events should shew that it is necessarily implied therefrom. Here all that can be said is that the County Court Acts, Rules, and Forms, make no express provision for the levying of interest by the high bailiff as a matter of course, as the Rules and Forms of the High Court do. Looking at the fact that probably the interest on a judgment would not be worth considering in one case out of a million, we are not surprised to find no provision for levying it as an ordinary accessory of a judgment such as we find in the High Court. We think, however, that the proper inference to be drawn from that fact is—not that the suitor in the county court is to be deprived without apparent reason of a benefit given to the suitor in the superior Court, but—that, if the suitor in the county court wants

to get interest on his judgment, he must make a subordinate application to the judge, who, if the claim is well founded, may make an order for the payment of interest which can be enforced in the usual way.

This view is confirmed by the 49th section of 19 & 20 Vict. c. 108, which enables a judgment of a county court in certain cases to be removed into the High Court, where it is to have the same force and effect as a judgment in the High Court. When so removed, the judgment would, of course, carry interest; and there seems no sound reason why it should carry interest in the one court and not in the other. Nor should it be forgotten that by various recent statutes the jurisdiction of the county court has been considerably increased, so that at the present time judgment for a considerable amount may be obtained either on claim or counter-claim there. Again, by written consent of the parties, the county court has jurisdiction to try actions of any kind or amount. In both these cases it would be anomalous that the power to sue in a county court should be accompanied by the loss to the successful suitor of the right to recover interest on his judgment. For these reasons we think the judgment below was substantially right, and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Peace & Hornewood.*
Solicitors for defendants: *Sandilands & Co.*

J. R.

1887
March 16.

Ex parte BULL. *In re* BEW.

Landlord and Tenant—Distress—Ordinary Course of Dealing—Time when Rent deemed to be due—Amount for which Landlord can distrain—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 44.

By s. 44 of the Agricultural Holdings Act, 1883, a landlord cannot distrain for rent which became due more than a year before the distress, provided that, where according to the ordinary course of dealing payment of the rent has been allowed to be deferred until the expiration of a quarter or half-year after the rent legally became due, for the purpose of the section the rent shall be deemed to have become due at the expiration of such quarter or half-year, and not when it legally became due :—

Held, that in a case within the proviso the landlord was entitled to distrain for rent then legally due, but not yet payable according to the course of dealing, and also for rent which had become legally due more than a year previously, but had become payable according to the course of dealing less than a year previously, although the total amount distrained for exceeded one year's rent.

APPEAL by the Rev. Henry Bull from the order of the judge of the County Court at York directing that the appellant should pay to the Official Receiver part of the proceeds of a distress.

The bankrupt became tenant to the appellant of a farm under an agreement, dated July 29, 1874, by which the premises were to be held, as to the arable land from February 2 then next, as to the grass land from April 5 then next, and as to the farm-house and buildings from May 1 then next, for and during the term of one year, and so on from year to year (until determined by the prescribed notice to quit), yielding and paying unto the landlord the yearly rent or sum of 75*l.*, in one sum, on June 24 in each year, the first payment to begin and be made on the 24th day of June then next ensuing.

The rent was afterwards increased by consent to 80*l.* a year.

The bankrupt stated in an affidavit that the rent had been collected in ordinary course of dealing ever since he had been tenant to the appellant, in two equal half-yearly payments, the first half-yearly payment being made in the September following the date when it was due by the agreement, and the second half-yearly payment being made in March of the year following.

He further stated that in September, 1886, he owed to the appellant 59*l.* 4*s.* 5*d.*, arrears of rent reserved, due by agreement

on June 24, 1885, but customarily payable in half-yearly payments in the months of September and March following, and 80*l.* for one year's rent reserved, due by agreement on June 24, 1886, but customarily payable, as to one half of the same in the month of September, 1886, and as to the remainder in the month of March, 1887.

The appellant distrained for 139*l.* 4*s.* 5*d.* This distress took place before the bankruptcy, according to the affidavit of the bankrupt on September 16, 1886, according to the affidavit of the bailiff who effected the distress on September 15th.

The order appealed from directed that the appellant should pay to the Official Receiver the sum of 59*l.* 4*s.* 5*d.*

By the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 44: "It shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies to distrain for rent which became due in respect of such holding more than one year before the making of such distress. . . . . Provided that where it appears that, according to the ordinary course of dealing between the landlord and tenant of a holding, the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half-year as aforesaid, as the case may be, and not at the date at which it legally became due."

W. Graham, for the appellant. Sect. 44 of the Agricultural Holdings Act only prohibits distress "for rent which became due . . . more than one year before the making of such distress;" but, by the proviso, in calculating time the year is to commence at the customary time of payment, where payment is deferred by the ordinary course of dealing. Here the 1885 rent, for the purpose of calculating the period at which the year expired, must be taken to have become due in September. There is nothing in the Act to prevent the landlord distraining for the 1886 rent, which by the lease was due at Midsummer. The Act does not provide that a landlord shall in no case distrain for more than one year's rent, which is what the County Court Judge has decided.

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Ex parte Bull. In re Bew.

If this had been the intention of the legislature it would have been carried out by an express provision, as is done in the case of distress after the commencement of the bankruptcy by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42.

M. J. Muir Mackenzie, for the Official Receiver. The contention for the appellant amounts to this, that the 1885 rent became due in September, and the 1886 rent at Midsummer. This is inconsistent, and cannot be the meaning of the Act. The proviso has no application, because it is not shewn that payment of the rent was allowed to be deferred until the expiration of the quarter; and if the rent was usually paid at some day which was not the last day of a quarter or half-year, then the 1885 rent must be taken to have become due at Midsummer, and the landlord was not entitled to distrain for it.

Mathew, J. I am of opinion that this appeal ought to be allowed.

There is some confusion in the case as to the exact dates, so I will take the case of a year's rent, payable in advance, becoming due on June 1. Suppose in such a case that a year's rent were then in arrear; on June 2, at common law, the landlord could distrain for both the past and the future rent. It is contended that the Agricultural Holdings Act has the effect of depriving the landlord of the right of distraining for the arrears because the rent has been due for more than a year, but the landlord's answer is that the rent is due by the custom in September. What the County Court Judge has done here is to alter the lease and say in effect that the rent was not payable in advance. It is clear to me that the arrears had not become due more than a year before the distress, and that the landlord was entitled to distrain for the rent in advance.

Cave, J. I am of the same opinion. The object of s. 44 of the Agricultural Holdings Act is to take away the right to distrain for rent which has been due for more than twelve months; but the landlord still has all his other remedies. There was no intention to affect the rent until it had been due for more than a year. In the present case, on June 24, 1885, a year's rent became due; on

June 24, 1886, another year's rent became due. On June 23, 1886, the landlord could have distrained for the year's rent which became due on June 24, 1885; on June 25, 1886, he could have distrained for the rent which became due on June 24, 1886. But the landlord was accustomed to allow the tenant three months before he expected payment of any part of the rent, and therefore, by the proviso in the section, he had three months longer to distrain for the rent which became due on June 24, 1885, and the distress in the middle of September, 1886, was good.

It is contended on behalf of the Official Receiver that if the landlord takes advantage of the proviso, he loses his right to distrain until the next rent is three months in arrear, but the Act does not say so; it does not provide that a landlord shall not distrain for more than a year's rent at a time; it only provides that he shall not distrain for rent that is more than twelve months overdue. Here the custom and the proviso keep the right to distrain open for three months longer.

Appeal allowed.

Solicitors for the appellant: *Torr, Janeways, Gribble, & Oddie, for Bromet, Taylor & Bromet, Tadcaster.*

Solicitor for the Official Receiver: *The Solicitor to the Board of Trade.*

P. B. H.

1887
March 9, 21.

[IN THE COURT OF APPEAL.]

MORGAN AND ANOTHER *v.* HARDY AND ANOTHER.
FOTHERGILL, THIRD PARTY.

Bankruptcy—Order of Discharge—Future and Contingent Liabilities—"Liability incapable of being estimated," whether barred by Bankruptcy, where not submitted to Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.

The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenant with the lessors to yield up the demised premises in repair at the end of the term. Eight years before the term expired the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessees tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant for indemnity; but after the term expired they claimed in an action to be indemnified by him in respect of damages recovered against them by the lessors for breach of the covenant to yield up the premises in repair:—

Held, by Bowen and Fry, L.JJ.—Lord Esher, M.R., dissenting—that the claim of the lessees was barred, under s. 49 of the Bankruptcy Act, 1869, by the order of discharge, because the effect of s. 31 was to make the assignee's future and contingent liability on his covenant for indemnity a debt provable in the liquidation, unless the lessees obtained an order of the Court declaring it to be a liability incapable of being fairly estimated.

Per Lord Esher, M.R. The lessees' claim was not barred by the order of discharge, because the assignee's liability was, at the date of the liquidation proceedings, incapable of being estimated at all; and the provisions of s. 31 did not apply to such a liability.

Judgment of Denman, J., reversed.

APPEAL from a judgment of Denman, J., on further consideration. (1)

Action for damages for breach of covenant.

The statement of claim alleged, in substance, that by lease of January 9, 1833, the plaintiffs' predecessors in title demised to the defendants' predecessor in title certain messuages, buildings, and hereditaments for a term of fifty years, seven months, and twenty-two days from the date of the lease; that the lessees thereby covenanted to keep and yield up at the end of the term the demised premises in good and tenantable repair, and that the premises were not kept and yielded up in such repair.

(1) Reported 17 Q. B. D. 770.

The defence denied the alleged breaches; and the defendants by leave brought in Fothergill as a third party, who, in answer to the defendants' claim against him, set up his discharge under liquidation proceedings; to which the defendants replied that their claim against him was not a debt provable in the liquidation to which the order of discharge applied.

At the trial the material facts with respect to the defendants' claim against the third party were as follows:—

By deed of July 19, 1873, the defendants assigned to the third party and his partner, Huntley, the premises comprised in the lease of 1833 for the residue of the term; and the assignees thereby jointly and severally covenanted to perform all the covenants in the lease, and to indemnify the defendants in respect of any breach of those covenants.

On June 5, 1875, the third party and Huntley filed a petition for liquidation of their affairs by arrangement. A meeting of creditors was held, and a receiver appointed, and on October 28, 1875, a resolution for liquidation by arrangement was passed. On December 14, 1875, a scheme for arrangement of the debtors' affairs was approved, and on January 3, 1876, they received their discharge. In none of the liquidation proceedings was any claim made or scheduled, or proof tendered by the defendants, in respect of the possible liability of the third party under the covenant contained in the deed of assignment of July 19, 1873.

It was admitted on his behalf that, unless the defendants' claim against him in the action was barred by the liquidation proceedings, he would be liable to them on his covenant for indemnity for any damages recovered against them by the plaintiffs for breach of the covenant in the lease to yield up the demised premises in repair.

On further consideration Denman, J., gave judgment for the plaintiffs against the defendants for 1680*l.* damages, and judgment for the defendants against the third party for the same amount.

The third party appealed.

MacIntyre, Q.C., and *Clement Higgins, Q.C.* (*G. M. Edwardes-Jones* with them), for the appellant. The third party's liability on his covenant to indemnify the defendants was capable of being

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estimated, and was therefore provable in the liquidation proceedings. The cases decided before the passing of the Bankruptcy Act, 1869—such as *Robinson* v. *Ommanney* (1)—have no application, because the language of s. 31 of the Bankruptcy Act, 1869 (2), defining liabilities provable in bankruptcy, is

(1) 23 Ch. D. 285.

(2) 32 & 33 Vict. c. 71, s. 31: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.

"An estimate shall be made, according to the rules of the Court for the time being in force, so far as the same may be applicable, and where they are not applicable, at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

"Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court, and the Court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy; but if the Court think that the value of the debt or liability is capable of being fairly estimated, it may direct such value to be assessed, with the consent of all the parties interested, before the Court itself, without the intervention of a jury, or, if such parties do not consent, by a jury, either before the Court itself or some other competent Court, and may give all necessary directions for such purpose, and the amount of such value when assessed shall be provable as a debt under the bankruptcy.

"'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

much wider than in any former Act. The object of the Act was to liberate the debtor from every kind of debt or liability, except those specifically mentioned.

[LORD ESHER, M.R. The covenant in respect of which the third party is liable to indemnify the defendants is a covenant to leave the premises in repair at the end of the term. That covenant was not broken at the time of the liquidation proceedings. How was it possible to estimate the chance of the covenant being broken at the end of the term; and, if it should be broken, how could the damages possibly be estimated, depending, as they must, upon the extent to which the premises were out of repair at the end of the term?]

Some estimate must be made. There is no greater uncertainty here than there is in estimating sums payable under contracts of life assurance, where the contingency is the duration of a person's life.

[FRY, L.J. Must not this be taken to be a liability capable of being estimated until the person claiming in respect of it has obtained an order of the Court that it is not, under s. 31 of the Act of 1869? If such an order be obtained the liability shall, by the same section, "be deemed to be a debt not provable in bankruptcy," so that an order of discharge under s. 49 does not relieve the debtor from it. Here the defendants should have carried in a proof in the first instance before the trustee in the liquidation proceedings.]

It is submitted that that view is the true one; and it is supported by expressions of opinion by the judges in *Ex parte Llynvi Coal and Iron Co., In re Hide* (1); *Ex parte Waters, In re Hoyle.* (2) The debtor is entitled to be relieved of all liability. Some effect must be given to the indemnity. The trustee, if the defendants had carried in their proof, should have put a nominal value upon the liability, from which there could have been an appeal. It is submitted, therefore, that the defendants' claim is barred by the liquidation proceedings.

[They also referred to *In re Sneezum, Ex parte Davis* (3); *Linton* v. *Linton* (4); *Collyer* v. *Isaacs.* (5)

(1) Law Rep. 7 Ch. 28.
(2) Law Rep. 8 Ch. 562.
(3) 3 Ch. D. 463.
(4) 15 Q. B. D. 239.
(5) 19 Ch. D. 343.

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Lumley Smith, Q.C., and *A. à B. Terrell*, for the respondents, were asked by the Court to confine their argument to the question whether the defendants, before seeking to make the third party liable at law, ought not to have carried in a proof before the trustee and obtained an order of the Court, under s. 31, that the liability of the third party was incapable of being fairly estimated.

It is contended that s. 31 does not apply to a liability incapable of being estimated, as was this. It cannot have been intended to force a claimant to go through the form of sending in a proof when the only result must be that the Court would declare the liability incapable of estimation. In order to come within the section the liability must be one resulting, or capable of resulting, in the payment of money or money's worth, "as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." This was not a liability capable of being ascertained by any mode of valuation.

C. Higgins, Q.C., in reply. The third clause of s. 31 provides that "an estimate shall be made." The estimate is to be made at the trustee's discretion, and he must at any rate exercise his discretion, from which the parties can appeal.

Cur. adv. vult.

March 21. LORD ESHER, M.R. In this case the liability of the third party arose from his covenant to indemnify the defendants in respect of any breach of their covenant to leave the demised premises in good and tenantable repair, and it was admitted that the defendants had a right over against the third party unless that right was barred by the Bankruptcy Act, 1869. The liquidation proceedings took place about eight years before the time fixed for the expiration of the lease.

The question for our decision is, whether or not the third party's liability at that time to indemnify the defendants, or the chance of his becoming liable at that time to indemnify them, was barred by the liquidation proceedings. It is necessary to consider, first, whether this was a liability capable of being fairly estimated by the trustee in bankruptcy—whether it was possible at that distance of time in advance to estimate a liability depending upon such contingencies as whether the premises would, or would not, be out of repair at the expiration of the lease, and if

they were out of repair, what would be the extent of the damages? I think it is clear that this liability is one which could not, according to any business view of the matter, be fairly estimated. Any attempt to estimate it would be mere chance and guess-work. But it is said that, although the liability is incapable of being fairly estimated, the claim in respect of it is nevertheless barred by virtue of s. 31 of the Act of 1869, because the defendant, who would be entitled as against the third party, did not carry the matter before the trustee in the liquidation in order to obtain an estimate of that which, as I have said, was incapable of being fairly estimated. Now s. 31 has regard to the business transaction of bankruptcy. Applying the true rule of construction to that section we ought, I think, to take care that we are not stopped by mere technicalities from giving the true business effect to it. By the hypothesis the liability cannot be fairly estimated. Is it a true business view of the effect of the section to say that you must go to the trustee and ask him to estimate that which no man can estimate, so that he is bound to reply, "I can make no estimate of this liability"? Can it be the true view of the transaction intended by the Act that the party who is relying on the fact that the liability cannot be estimated is bound to incur loss of time and expense in going before the trustee to get that inevitable answer? It seems to me that, unless compelled by the language of the Act, one ought not to give effect to a technicality by holding that so futile and expensive a process must be gone through. I do not think that the Act of Parliament requires that this ceremony should be gone through. Sect. 31 of the Act of 1869 enacts that "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication . . . shall be deemed to be debts provable in bankruptcy." No doubt, if those words stood alone, here is a liability; but does the section mean that a liability which cannot be estimated shall be a liability provable in bankruptcy? It goes on to provide that "an estimate shall be made, according to the rules of the Court for the time being in force, so far as the same may be applicable, and when they are not applicable at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any

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contingency or contingencies, or for any other reason, does not bear a certain value." I think that the words "an estimate shall be made" shew that the debts or liabilities mentioned in the former part of the section were intended to be debts or liabilities capable of being estimated, because the provision is that they shall be estimated. The estimate is to be made according to the Rules of Court for the time being in force. There are no rules which say that an estimate shall be made of that which is incapable of being estimated; but when the rules are not applicable the trustee is to estimate the value of the debt or liability at his discretion; in other words as he shall think fit. But how can he exercise a discretion in respect of a liability which cannot be estimated? I think, therefore, that the first part of the section applies to liabilities capable of being estimated, and I do not think that the latter part, in which the nature of the liabilities contemplated by the Act is described, enlarges the application of the section with respect to liabilities. The words are "liability shall include," and it is to include any obligation, or possibility of an obligation, to pay money or money's worth on the breach of any express or implied covenant, agreement, or undertaking, whether or not the breach occurs, or is likely to occur, or is capable of occurring before the close of the bankruptcy, and it also includes any express or implied agreement or undertaking to pay, or capable of resulting in the payment of money or money's worth, "whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." Now, if the liability is not capable of being estimated, it is not capable of being ascertained at all, and I think that it is not a liability such as s. 31 contemplates. The words "or as matter of opinion" were intended to apply to cases where there might be one of two opinions with respect to the estimate, and I do not think that those words can have been meant to include a liability incapable of being estimated at all. The intermediate clause in the section provides that any person aggrieved by any estimate made by the trustee may appeal to the Court, and the Court may,

"if it think the value of the debt or liability incapable of being fairly estimated," make an order to that effect which shall cause the debt or liability in question to be "deemed to be a debt not provable in bankruptcy." I am of opinion that that clause applies to cases in which the trustee has taken upon himself to make an estimate wrongly, and has assumed to put a value upon that which could not be valued. In such a case the Court will say, "You have been trying to perform an impossibility because this liability is incapable of being estimated, and therefore what you have done shall not bind the person against whom you have created this wrong valuation." The result is the same as if the trustee had done nothing. In the present case the trustee has done nothing, and that part of s. 31 therefore does not apply. The opposite argument seems to come to this: that, because the Act says that if the trustee does a foolish thing by making an estimate where no estimate can fairly be made it may be set right, therefore you must go before the trustee and ask him to do that foolish thing. I cannot think that the legislature intended so absurd a proceeding. If the trustee had made an estimate of this liability it must have been set aside by the Court. I therefore think that the defendant was not bound to go before the trustee and ask him to make an estimate. I am of opinion that the claim of the defendants against the third party was not barred by the liquidation proceedings.

BOWEN, L.J. After consideration, though disposed to take a different view during the argument, I have come to the conclusion, looking at the history of the Bankruptcy Act, 1869, and the decisions, that the third party was discharged from this liability by reason of the liquidation proceedings. The question of the difficulty of valuing the estate of a bankrupt is a very old one. Under the old law it was decided in a series of cases—amongst which are *Hastie's Case* (1) and *Mudge* v. *Rowan* (2)—that where it was impossible to calculate fairly the amount of a claim against the debtor's estate the case was not brought within the statutes 12 & 13 Vict. c. 106, and 24 & 25 Vict. c. 134, so as to free the debtor from liability. Those decisions really turned upon the

(1) Law Rep. 4 Ch. 274. (2) Law Rep. 3 Ex. 85.

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special language of the Bankruptcy Acts then in force, and are to be explained on that ground. Under the old law constant difficulties arose in consequence of the imperfect conditions which then existed with respect to the discharge of the debtor; and I think that it was in order to avoid those difficulties, and to put an end once for all to questions like this, that the Bankruptcy Act, 1869, was passed. The general object of that Act in this respect was laid down in emphatic terms in *Ex parte Llynvi Coal and Iron Co., In re Hide.* (1) In that case James, L.J., said: "A great number of cases occurred before the passing of the late Act in which the bankrupt was left liable to several claims of various kinds, and the persons who had those claims were entirely excluded from any participation in the general division of the assets. Then came the Act of Parliament, which—dealing in express terms with almost every one of the cases which had ever previously occurred, and excluding nothing but demands for damages for personal torts—provided that there should be nothing whatever for which a right to proof should not be given. Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy, and to be ascertained either by the Court itself or with the aid of a jury. The broad purview of this Act is that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind. On the other hand, all the persons from whose claims, and from liability to whom, he is so freed are to come in with the other creditors and share in the distribution of the assets." Mellish, L.J., agreed with that view. "I think," he said, "that the main object of the legislature in all these sections is perfectly clear. The legislature, in Bankrupt Act after Bankrupt Act, has been trying to relieve the bankrupts from both their present and future liabilities upon contracts; but up to the passing of this last Act, that had been very incompletely provided for, and by the construction which has been put on previous sections, it was found that, notwithstanding the language used by the legislature, a bankrupt did still remain liable on a variety of contracts which he had previously entered into." The same view has frequently been upheld

(1) Law Rep. 7 Ch. 28.

in this Court. In *Ex parte Neal, In re Batey* (1), the doctrine was applied to the extent of holding that a claim which depended upon the probability of a woman continuing chaste was provable in bankruptcy. In the present case it has been said that no valuation can be made of the third party's liability, and therefore that it would be an idle ceremony to send in a proof to the trustee, because it must of necessity be rejected. In my opinion it by no means follows that such a proof must of necessity be rejected. I decline to assume that the subject of proof is incapable of valuation, in order to consider as a separate inquiry whether any liabilities that were *ex concesso* incapable of any estimation would or would not be liabilities within the statute. The question here arises upon liquidation proceedings, the effect of which in respect of releasing the debtor is the same as in the case of bankruptcy. By s. 49 an order of discharge shall release the bankrupt from all debts provable under the bankruptcy, with certain specified exceptions which do not include the liability in question here. The question is therefore narrowed to this: Was this a debt or liability provable in bankruptcy? Sect. 31 excepts from the right of proof demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, and goes on:—"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication . . . . shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy." Those words are very strong and plain, and I think that they must be construed according to their natural and obvious meaning. According to that meaning I think that they include the liability in question here. It is said that the last clause of s. 31 defines "liability" and excludes this particular matter, because it provides that "liability" shall include the specified obligations and agreements resulting in the payment of money which is "as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion;" and it was said that this liability was not capable of being so ascertained. But when that clause of the section is examined it clearly does not profess to

(1) 14 Ch. D. 579.

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define "liability." It only adds certain things which "liability" is to "include." It was also said that the provision in s. 31, which enables a person aggrieved by an unfair estimate to appeal to the Court against the trustee's decision, had no beneficial operation where the debt or liability was incapable of being estimated at all, and had not been taken before the trustee, and that s. 31 therefore had no beneficial operation in this case, because the only effect of going before the trustee would be that, if he made an estimate, the Court would set it aside. That view seems to me to rest wholly on the assumption that this part of the section has no beneficial operation in respect of claims which, if they were brought before the Court, would be held incapable of being fairly estimated. I think that the key to the meaning of this part of the clause is to be found in the words "an estimate *shall* be made." It was intended to compel the creditor to submit his claim to the trustee, and to obtain some estimate from him. Nor is it by any means clear to my mind that, if this claim had been submitted to the trustee, it would have resulted in nothing. It does not follow that the liability of the third party in respect of the covenant to repair at the termination of the lease might not have a value to the defendants, and if the trustee had put a value upon that liability, it might have well been to the interest both of the claimants and of the creditors to accept that value. It might be the interest of the claimants to take something in discharge of a liability which might turn out to have no value, and it might be the interest of the creditors that the debtor should get a complete discharge from a liability which at the termination of the lease might turn out to be heavy. The object of s. 31 is, in my view, to compel every claimant under a contract to come in under the bankruptcy and prove in respect of his claim. If the trustee cannot estimate the liability he must put down some nominal sum, and then the claimant may appeal. If the Court holds that the liability is incapable of estimation it ceases to be the subject of proof in the bankruptcy. But no creditor under a contract is entitled without having been before the Court to stand outside the bankruptcy and to take his chance. The Act, I think, meant to provide that only those creditors who had been before the Court and obtained a declaration that the liability in respect of

which they claimed was incapable of being fairly estimated should be allowed to stand outside the bankruptcy, the object being that the debtor should, if possible, be freed from liability on all his contracts by obtaining his discharge. That view, which I think is a sensible view, is also suggested by Lord Blackburn in *Breslauer* v. *Brown* (1). That was a case of composition under s. 126, so that the precise point did not arise, but Lord Blackburn intimated his opinion thus: "Now if this had been a regular bankruptcy, and if they had so said, and Breslauer had obtained his discharge, he would still have been liable in respect of this amount; it would have been a debt which was not barred by the discharge. This, however, was not a regular bankruptcy; if it had been, there would have been an order of discharge, and these questions might have then have arisen—whether, if Arthur Brown, instead of coming in and trying to prove his claim in respect of this liability, and to get an estimate of it, and failing therein, by the Court deciding that the liability was not capable of being proved or being estimated, or whether, if instead of doing that, he had waited until the order of discharge had been given, he could have set up the case that the Court ought to have come to the conclusion that it was not capable of being valued, or whether, having allowed his opportunity of raising that question to pass by, he would have been finally and conclusively bound by the order of discharge. These are questions which do not arise here, and probably never will arise. I do not wish to prejudge them. I only say that I think he would have had very great difficulty indeed in raising such a claim after having so missed his opportunity." I think that the suggestion made by Fry, L.J., during the argument appears the true and obvious solution of the question we have to decide. I am of opinion, therefore, that the defendants' claim against the third party was barred by the liquidation proceedings.

FRY, L.J. In this case proceedings for liquidation by arrangement of the third party's affairs were taken under s. 125 of the Bankruptcy Act, 1869. By the 10th sub-section it is provided that a certificate of the debtor's discharge given by the registrar

(1) 3 App. Cas. 672, at p. 699.

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shall have the same effect as an order of discharge in the case of bankruptcy. The effect of an order of discharge is to be found in s. 49: an order of discharge shall release the bankrupt from all "debts provable under the bankruptcy" with the exception of certain specified debts not in question here. What are "debts provable under the bankruptcy?" Sect. 31 gives the answer: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy," and then the section proceeds: "Save as aforesaid all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication . . . . shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy." No language could well be wider than that language. The demand in the present case is plainly grounded upon a liability future and contingent at the date of the liquidation. It is clearly a description of liability which is provable under the words I have read. It is within the description of "liability" contained in those words without its being necessary to have recourse to the subsequent clause in the section which contains a declaration expanding the word "liability." I do not think it is necessary to consider whether the third and fourth clauses cast upon the trustee the duty of making some estimate of the liability. I am inclined to think that the Act contemplates that he should make some estimate; but it is no doubt open to him to refuse to make an estimate on the ground that no estimate is possible, and leave the party dissatisfied to his appeal. The fourth clause of s. 31 gives power to "any person aggrieved by any estimate made by the trustee," to appeal to the Court, "and the Court may, if it think the value of the debt or liability incapable of being fairly estimated," make an order which shall have the effect of making the debt or liability not provable in the bankruptcy. I am inclined to think, I confess, that the words "and the Court may" are dependent upon the earlier words "any person aggrieved by any estimate," so that the power to make that order would only apply where an estimate has been made. But whether that be so or not, I am of opinion that the general scope of s. 31 is this: It was intended on the

one hand to release the debtor from every liability which has not been declared by the order of the Court to be a liability incapable of being fairly estimated: On the other hand it was intended to give every person who claimed in respect of a provable liability a right to come in and participate in the distribution of the estate. I do not think that the application to the trustee under such circumstances as these is futile. In my view the legislature intended that the debtor by obtaining his discharge should be freed from every liability except such as by order of the Court had been declared to be deemed a liability not provable in the bankruptcy. I think that is the simple meaning of s. 31, and Lord Blackburn and James and Mellish, L.JJ., appear to have taken the same view. The decision in the case of *Linton* v. *Linton* (1) turned on the peculiar nature of the claim. It was a claim for alimony. The point dwelt upon by the Court was that from the nature of alimony it was not a debt or liability provable in bankruptcy, being a weekly or monthly payment for the personal maintenance of the wife, which might be varied from time to time according to the husband's circumstances; and Bowen, L.J., pointed out that, if the Court were to hold that the husband's liability in respect of future alimony was barred by the bankruptcy, the wife could go the next week and obtain a new order from the Divorce Court. I think that that case does not bind us here. I am of opinion that the third party is entitled to succeed on this appeal.

Appeal allowed.

Solicitors for appellants: *Field, Roscoe & Co.*
Solicitors for respondents: *Kingsford, Dorman & Co.*

(1) 15 Q. B. D. 239.

W. A.

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Feb. 18.

[IN THE COURT OF APPEAL.]

EX PARTE DEVER. IN RE SUSE AND SIBETH.

Bankruptcy—Property of Bankrupt—Contingent Interest—Possibility—Interest in Policy of Assurance for benefit of Wife—Introduction of Foreign Law by Contract—Lex fori—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15 —*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A policy of insurance on the life of a husband for the benefit of his wife was, in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The husband was domiciled in England. The application for the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife "for her sole use, if living, in conformity with the statute," and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The statute referred to was a statute of New York which enabled a married woman to insure the life of her husband for her sole use, but provided that in certain contingencies his creditors should be entitled to a proportion of the amount secured by the policy. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1886 the wife exercised the right of withdrawal, and the company paid £2959 in respect of the policy:—

Held, that, even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation:

Held, also, that the provision of the New York statute for the payment of a proportion to the husband's creditors was not incorporated in the policy.

APPEAL against an order of the registrar.

In July, 1876, a "tontine" policy of insurance for 6000*l.*, on the life of W. E. Sibeth, was granted by the Equitable Life Assurance Society of the United States of America, whose principal office was in New York, (through their branch office in London), at an annual premium of 378*l.* sterling, payable at the London office, by which, in consideration of the payment of the premiums, the company promised to pay the 6000*l.* to the wife "for her sole use, if living, in conformity with the statute," and, if not living,

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to the children of the husband, or their guardian, for their use; or, if there should be no such children, then to the executors, administrators, or assigns of the husband, at the London office, within sixty days after notice and proof of the death of the husband furnished to the society at their principal office at New York. The application for the policy was made by W. E. Sibeth on behalf of his wife. The policy was made subject to the conditions, printed on the back of the policy, that the "tontine" dividend period for it should be completed on July 12, 1886; that no dividend should be paid upon it unless the life assured should survive the completion of the "tontine" dividend period, and unless the policy should be then in force; and that, on the completion of that period, provided that the policy should not have been previously terminated by lapse or death, the legal holder should have the option of doing one of four things, the first of which was "to withdraw in cash the policy's entire share of the assets (i.e., the accumulated reserve and surplus appropriated by the society to the policy). By a statute of the state of New York, passed on April 18, 1870, it was provided that "it shall be lawful for any married woman by herself and in her name . . . . to cause to be insured for her sole use the life of her husband for any definite period, or for the term of his natural life, and, in case of her surviving such period or term, the amount becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through, or under him. But, when the premium paid in any year out of the property or funds of the husband shall exceed $500, such exemption from such claims shall not apply to so much of the said premiums so paid as shall be in excess of $500, but such excess, with the interest thereon, shall enure to the benefit of his creditors." The husband was resident and domiciled in London, where he carried on business in partnership with his sons under the firm of Suse & Sibeth. The premiums were paid by the husband down to July, 1883. In October, 1883, the firm of Suse & Sibeth filed a liquidation petition, under which Dever was appointed trustee of the joint estate and of the separate estate of W. E. Sibeth. In 1884 W. E. Sibeth

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obtained his discharge. The premiums on the policy were after July, 1883, paid by the wife out of her separate estate. In August, 1886, she exercised the option given to her by the above conditions of withdrawing in cash the policy's share of the assets, and the company thereupon paid 2959*l.* in respect of the policy, which was given up to them.

The trustee in the liquidation made a claim to the money, and it was deposited in a London bank, in the joint names of the wife and the trustee, pending the determination of their respective rights.

The registrar held that the whole of the money belonged to the wife as her separate estate. The trustee appealed.

Bigham, Q.C., and *F. M. Abrahams*, for the trustee. The policy must take effect according to the American law, which is expressly imported into the contract by the use of the words "in conformity with the statute," which must mean the New York statute, and under that statute the husband's creditors are, at any rate, entitled to the excess of the premiums paid out of his property above $500 in each year, and the trustee is entitled to that excess. The rights of the parties to the contract cannot be altered by the circumstance that the husband's bankruptcy has taken place in England. The contract is in effect that, in case the husband shall become a bankrupt, the company will pay a certain proportion of the money to his creditors, not to the wife. If the insertion of the words "in conformity with the statute" was only intended to enable the payment to be made to the wife for her separate use, the words were unnecessary, for she could have obtained that benefit under the English law. *Ex parte Melbourn* (1) is only a decision that a person who sues in a particular Court is bound by the procedure of that Court. The decision in *Ex parte Holthausen* (2), did not depend upon whether the contract was governed by English or by foreign law. The money, however, which has been actually paid by the company has been paid, not on the death of the husband, but on the option to withdraw exercised by the wife under the special conditions of the policy. The money paid in that event is not subject to the

(1) Law Rep. 6 Ch. 64. (2) Law Rep. 9 Ch. 722.

prior provisions of the policy for payment to the wife for her separate use. It, therefore, belongs to the husband by his marital right, and, being a contingent interest, it passed to the trustee in the liquidation, and vested in him before the debtor obtained his discharge.

Reid, Q.C., and *Sidney Woolf*, for the wife. The money payable to the wife under the option to withdraw is subject to the same provisions as the money which would become payable under the policy in the ordinary way. The policy was effected for the benefit of the wife, and for her separate use, and whatever is received by virtue of it in any way is subject to that condition. She would be entitled to it under s. 10 of the Married Women's Property Act, 1870. The contract was made with her, not with the husband.

[FRY, L.J. The ultimate limitation is to the executors, administrators, or assigns of the husband.]

That is subject to the wife's right to withdraw.

Abrahams, in reply. The husband had a contingent interest under the policy in the event of his surviving his wife and children. The children had a contingent interest, and some of them were members of the firm, and the trustee is administering their assets also. The wife could not by exercising her option to withdraw defeat the rights of her husband and children. If there had been no bankruptcy, and the wife had exercised her option to withdraw, the money paid by the company would have belonged to him by his marital right, and his contingent interest in the event of her exercising that option had vested in the trustee before he obtained his discharge.

LORD ESHER, M.R. The trustee in the bankruptcy when he was before the registrar claimed the whole of the sum of money which had been paid in respect of the policy for the husband's creditors; the wife opposed the claim, asserting that, by the contract which she, as she insisted, had made with the insurance company, the whole of the money ought to be paid into her hands. The registrar decided that no part of the money belonged to the husband's creditors. It seems to me to follow from the agreement between the parties when the money was deposited in their

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joint names, that it was then (whatever might be the subsequent rights) to be paid out by a joint cheque into the hands of the wife. The question seems to me to depend, first, upon what is the true construction of the policy, and secondly, upon what are the rights of the parties according to the English bankruptcy law in an English bankruptcy. I am satisfied that the American law can only be vouched if it is introduced into the contract as part of the contract, and, if the contract was an American contract, in order to see what is the true construction of it. But, the moment you have got at the true construction of the contract, the distribution of the money must be according to the English bankruptcy law.

Now what is the true construction of the contract? It seems to me that it does not introduce as part of the contract any portion of the American law whatever. The policy says that the money is to be paid to the wife "in conformity with the statute." According to the American statute, if the contract is that the money is to be paid to the wife, it is to be paid to the wife. That is all. The words "in conformity with the statute" have practically no meaning, because without them by the contract the money is to be paid into the hands of the wife.

What is the meaning of the contract? It was made upon an application by the wife to the insurance company, the husband signing it for her so as to make his signature hers, so that she is the person with whom the contract was made. He was not a party to it in any way. It is not denied that she had power to enter into the contract as if she had no husband. The company contract with her, and with her only, that the money shall be paid to her if she survives her husband. If she does not survive her husband, on his death the money is to be paid to the children, but still the contract is with her. In my opinion, if that event had happened and the company had not paid the money, her administrator would have had to bring an action against the company on behalf of the children. That event however did not happen. Then there is another contingency, viz., that, if she is dead and there are no children, the money is to be paid to the executors of the husband, but it is not to be paid as part of his estate. It is only to be paid to the executors after the husband's

death; he could never have any interest in it at all. Then there is another contingency upon which the company are bound to make a payment to her, the contract being made with her as if she were a feme sole. On the expiration of the "tontine period" she may insist upon the company paying to her a certain sum. It seems to me impossible to doubt that the meaning of the parties was that that sum was to be paid to her for her sole use. I cannot imagine that any of the parties supposed that, if she exercised this option, she would immediately lose all claim to the money for her own benefit, and it would go to her husband. That seems to me absurd, and nothing could induce me to believe that that is the meaning of the contract. And, if that is not the meaning, what is the meaning? Surely, that, if she exercises the option, the money is to go to her as if she were a feme sole. If so, how can it belong to the husband's creditors? The money is to be paid to her for her sole use, and when her husband becomes bankrupt his creditors have not the smallest right to it. Their rights must be determined according to the English law of bankruptcy, and the American statute cannot control the procedure of the English Court of Bankruptcy. Whether the husband had or had not obtained his discharge before the wife exercised the option, I am clearly of opinion that the trustee in his bankruptcy could have no claim to this money.

But, even if this view is wrong, and the money paid on the exercise of the option did not belong to the wife for her separate use, still the option had not been exercised when the husband obtained his discharge, and it might never have been exercised. The contingency of its being exercised was a mere possibility which could be of no value to anybody, and was not property of the bankrupt which passed to his trustee. In neither view of the case can the money belong to the husband's creditors, and, therefore, our simple duty is to dismiss the appeal.

Bowen, L.J. I am of the same opinion in the result, though not altogether for the same reasons. The question brought before us was, whether this money ought to be paid to the husband's creditors or whether it belongs to the wife, the main consideration pressed upon us being that the American law is

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imported into the contract, or at any rate so much of that law as gives the husband's creditors a right to a certain portion of the sum payable under the policy on his death. I do not think that is the question which we have to decide. If it were, I should feel the greatest difficulty in holding that the American law is imported. The rule as to the prevalence of one national law over another was laid down by this Court in *Jacobs* v. *Crédit Lyonnais* (1) thus: "What is to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or primâ facie rules that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." If we had now to decide what was the true implication to be derived from the general character of the contract and its provisions as to the law which was to govern its construction, we should have to apply the rule thus laid down in *Jacobs* v. *Crédit Lyonnais*. (2) But we are discharged from the obligation of pursuing that inquiry, because there is an express reference to American law in this contract, and all we should have to decide would be, what that express reference means, and how much of the American law is intended to be incorporated by it. In my opinion the express reference to the American law in no way incorporates the American law so as to vary the contract to pay to the wife: at the most it would only incorporate the American statute so far as is necessary to determine to what extent the money is to be for the wife's separate use when it is paid to her under the contract, and if she is living at the time of the death of the husband. The contract

(1) 12 Q. B. D. 589, at pp. 599, 600. (2) 12 Q. B. D. 589.

in no way incorporates the American law so as to alter or control the obligation to pay to the wife. It seems to me impossible to suppose that it was intended to incorporate into the contract provisions of American law which apply only to American creditors. That would be to incorporate into the contract something which had nothing to do with its fulfilment, and would be inoperative and insensible.

The learned counsel for the trustee argued the case upon the assumption that we had to ascertain the rights of the wife in the event of the husband's death occurring in her lifetime. The question really arises, not upon the death of the husband, but upon the withdrawal by the wife, under a special clause in the policy, of the accumulated value of the policy, and we must therefore look to that special clause, which makes no reference to the American law, and decide upon the construction of that special clause to whom this money belongs. Now the money is to be withdrawn at the option of the legal holder of the policy. The question therefore is, not whether the company are bound to pay to the wife, but to whom the money belongs when it is paid. That is, perhaps, a matter of more difficulty. The view which the Master of the Rolls has taken is, that the contract affords an indication that this money was to be paid for the sole use of the wife. I cannot quite agree with that view. I do not think the contract implies that the money is to be paid for the sole use of the wife. I do not think there would be anything extravagant in a married woman wishing that her husband, whose interests are to a great extent identified with her own, should receive the surrender value of the policy, rather than that the premiums should be kept up, or the policy forfeited for want of their being kept up. But it seems to me not to be shewn, on the materials before us, that this money was, when the wife received it, to be for her sole use. It may well be that some other document would control the decision of that question, but upon the policy, the only document which is before us, it seems to me not to be decided.

But then comes this, which I think is the true ground on which our decision should be based. The husband was discharged in 1884, long before the option was exercised by the wife. We must consider what, at the time of the bankruptcy and before the

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discharge, was the property of the bankrupt? This was not an option which he could exercise (I believe it has been held that an option which a bankrupt may exercise does pass to his creditors); it was nothing more than a chance which the bankrupt had that his wife might, out of several alternatives, adopt one which might be for his benefit if she did adopt it. That seems to me to be a mere possibility. The wife might adopt any one of the alternatives, and it was a mere possibility that she would exercise that one which would be for the benefit of the husband. Such a possibility is not "property" of a bankrupt which passes to his creditors under s. 15 of the Bankruptcy Act, 1869, or under s. 44 of the Bankruptcy Act, 1883, and, upon that ground, I think we may safely dismiss this appeal, leaving it undecided, upon the materials before us, whether this money belongs to the wife for her sole use.

Fry, L.J. This case has unfortunately been argued as if the contingency which had happened had been the death of the bankrupt during the lifetime of his wife. It has been argued that the reference in the policy to the American statute imports into the contract the American law with regard to the claims of creditors upon the moneys secured by a policy effected in the United States for the sole benefit of a married woman. In my judgment that is not the true construction of this policy, and I entirely agree that the extent to which the foreign law is incorporated is a mere question of construction of the instrument. It appears to me that the words "in conformity with the statute" only provide for and govern the express stipulation to pay to Mrs. Sibeth for her sole use.

The American statute may be divided into two parts. It makes it lawful for the company, in the event of a policy being taken out for the sole use of a married woman in the lifetime of her husband, to pay the money to her, for her sole use. To that extent the statute is referred to in the policy, and introduced into the contract. Then the statute goes on to provide that, in a certain contingency, regulated by the amount of premiums paid by the husband, his creditors shall have certain rights against the policy moneys. That provision is introduced into the policy

(if at all) only by the reference to the statute as providing for payment to the sole use of the married woman, and it appears to me, as a matter of construction, that, even if the question had arisen upon the death of the husband during the lifetime of his wife, that clause of the statute which gives creditors rights upon the fund would not be incorporated into the contract. But that event has not happened, and the question really turns on the conditions relating to tontine policies printed on the back of the policy.

It is not disputed that Mrs. Sibeth is "the legal holder" of the policy. She had therefore four alternatives, the first of which she has adopted, viz., the option to withdraw in cash the accumulated reserve and surplus appropriated to the policy. The first question is, whether this provision is a stipulation for the payment of this portion of the assets to her, for her separate use. It is said that the agreement to pay the amount assured after the death of her husband to her, for her separate use, shews that the other payment, which can only take place during the life of her husband, is also to be made to her for her separate use. It must be observed that the payment of money to her for her separate use after the death of her husband could only exclude a second husband. The payment at the end of the tontine period would be made while the first husband is alive, and, if it is to be made to her separate use, that will exclude the now living husband. Before the recent legislation in this country, any personal property coming to a wife belonged to the husband, unless his right was excluded either by express agreement or by necessary implication. I cannot follow the Master of the Rolls in his view that it is plain that the intention of this clause was to give the money to the wife for her separate use. The separate use is expressed in the one case, when it was intended to exclude a second husband; if it was intended in the other case to exclude the present living husband, why was it not expressed? But it is not necessary to determine that point, though my present view is that the marital right of the husband is not excluded.

But then arises this question, whether the marital right (if any) of the husband in this sum was property which was vested in him at the commencement of the bankruptcy, or which

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devolved upon him before he obtained his discharge in 1884? Now what was the nature of that marital right, if it existed at all? It could only arise in the event of the policy not having been previously terminated either by lapse or death. If either of those two contingencies had happened, the option to receive the accumulations in cash could not arise. And, if the option did arise, it was an option to adopt one or other of four alternatives. How could the interest of the husband be "property," when it was something which could only accrue in the event of the exercise of the wife's option on a double contingency, which had not happened at the time when he obtained his discharge? How could it be said that any "property" was vested in him at the time of his discharge? It was the mere hope of a hope that something might come to him by reason of his surviving the ten years and of his wife's exercising her option in that particular manner. It was a mere spes, and there was nothing which could vest in the trustee in the bankruptcy.

This appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for trustee: *Michael Abrahams, Son, & Co.*
Solicitor for wife: *Alfred Howard.*

W. L. C.

March 25.

[IN THE COURT OF APPEAL.]

Ex parte GODFREY. In re LAZARUS.

Bankruptcy—Composition—Power of Court to enforce—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 18, 23—*Bankruptcy Rules*, 1886, *r.* 211.

The Court has the same power to enforce the payment of a composition agreed to under s. 23 of the Bankruptcy Act, 1883, after an adjudication of bankruptcy, as it has, under sub-s. 10 of s. 18, to enforce the payment of a composition agreed to under that section before any adjudication of bankruptcy has been made.

Appeal against the refusal of the registrar to make an order for enforcing the provisions of a composition accepted by the creditors of Montagu Lazarus.

On June 17, 1886, a receiving order was made against Lazarus, and he was afterwards adjudicated a bankrupt. In September,

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1886, the creditors, under the provisions of s. 23 of the Bankruptcy Act, 1883, resolved to accept a composition of 5s. in the pound. The resolution was duly confirmed, and was approved by the Court, and an order was made annulling the bankruptcy. The debtor failed to pay the full amount of the composition due to Edward Godfrey, one of the creditors, at the time appointed, and Godfrey applied to the Court for an order to enforce the provisions of the composition, and that the debtor might be ordered within fourteen days to pay to him the balance due in respect of the composition.

The registrar refused the application, on the ground that the Court had no power to make an order to enforce the provisions of a composition entered into under s. 23.

Godfrey appealed.

Winslow, Q.C., and *Herbert Reed*, for the appellant. The Court has the same power to enforce a composition under s. 23 as it has to enforce a composition under s. 18. (1) This follows from the

(1) Sect. 18 by sub-s. 1 provides that the creditors of a debtor against whom a receiving order has been made "may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs."

Sub-s. 2. "The composition or scheme shall not be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three-fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors, and is approved by the Court."

Sub-s. 8. "A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy."

Sub-s. 10. "The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court."

Sub-s. 11. "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made,

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provision of sub-s. 1 of s. 23, that "the same consequences shall ensue as in the case of a composition accepted before adjudication." The effect of this is to import sub-s. 10 of s. 18 into s. 23: *Ex parte Kearsley*. (1) It will be said that, if it had been intended to import sub-s. 10 of s. 18 into s. 23, it would have been expressly repeated, as sub-s. 11 of s. 18 is by sub-s. 3 of s. 23. But the reason for the express repetition of sub-s. 11 was, that it might otherwise have been supposed that the Court, after it had annulled the original adjudication against the debtor, could not have power to adjudicate him bankrupt again. Therefore an express power to make a fresh adjudication was inserted. This reason has no application to the summary power of enforcing the provisions of a composition which is given by sub-s. 10 of s. 18, and it was sufficient to import that power into s. 23 by the

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or thing duly done under or in pursuance of the composition or scheme."

Sect. 23, sub-s. 1. "Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication."

Sub-s. 2. "If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare."

Sub-s. 3. "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, adjudge the debtor bankrupt and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the composition or scheme."

Bankruptcy Rules, 1886, r. 211. "Where a composition or scheme is sanctioned, and default is made in any payment thereunder, either by the debtor or the trustee (if any), no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court."

Rule 216. "All rules relating to compositions or schemes of arrangement under s. 18 of the Act shall, so far as applicable, apply to compositions or schemes of arrangement under s. 23 of the Act."

(1) Ante, 168.

general words of sub-s. 1. Rules 211 and 216 of the Bankruptcy Rules, 1886, confirm this view.

[They were stopped by the Court.]

Cooper Willis, Q.C., for the debtor. Sub-s. 10 of s. 18 gives power to enforce "the provisions of a composition under *this* section." When sub-s. 1 of s. 23 says that "the same consequences shall ensue," it does not mean that the same powers shall arise and the same liabilities shall ensue as under s. 18. It refers only to the necessary consequences of the composition, such as the binding of all the creditors. An order to enforce the provisions of a composition is not a "consequence" of the composition; it is a liability imposed on the debtor in case of his default. And the express repetition in s. 23 of the power to adjudicate the debtor shews that the summary power of enforcing the provisions of the composition, which is not in terms repeated, was not intended to be given under s. 23.

LORD ESHER, M.R. In the case of a composition agreed to, under s. 18, before any adjudication of bankruptcy has been made against the debtor, if the debtor does not pay the composition at the time appointed, any creditor who has not been paid is entitled under sub-s. 10 to go to the Court of Bankruptcy and ask for an order upon the debtor to pay him, and, if the order is not obeyed, the creditor can apply for the committal of the debtor for contempt of Court. These are two consequences, the one being conditional upon the other, but to my mind they are both "consequences" of the composition. The creditor is not to bring an action for the original debt, but he can enforce payment of the composition which is due to him, and which may have been paid to the other creditors.

Then s. 23 deals with a composition agreed to after an adjudication of bankruptcy has been made against the debtor, and it provides that exactly the same arrangements between the debtor and his creditors may be made as under s. 18, and then it says, "and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition accepted before adjudication." If these words stood alone the "consequences" of a composition under s. 18 would be imported

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into a composition under s. 23 precisely as under s. 18. The creditor who was not paid his composition would not have to bring an action for his original debt, he would not be put to that trouble and expense, but he would enforce the payment of the composition, as in the former case, in the Court of Bankruptcy. If the words which I have quoted stood alone I should think the case was very clear. But it is argued that sub-s. 3 of s. 23 shews that this is not the right construction of sub-s. 1, for it speaks of an instalment of the composition as due "in pursuance of," not "in consequence of," the composition. I think that is a great deal too refined a distinction. Sub-s. 3 provides that if default is made by the debtor "the Court may, if it thinks fit, adjudge the debtor bankrupt, and annul the composition." Is that a cumulative remedy in addition to the power to enforce payment, or does it exclude that remedy? Why should not the creditor have the same remedies under s. 23 as under s. 18? Why should he under s. 23 be driven to bring an action for his original debt? He could not bring an action for the composition; he could only bring an action for the original debt. The language of s. 23 is capable of the construction that the remedy given by sub-s. 3 is cumulative, and, if this be so, and if that is the business meaning of the words, I incline, as I always do, to such a construction. In my opinion the Court has power, in case of a default by a debtor under s. 23, to adjudicate him bankrupt, but it can also make an order upon him to pay the composition. The remedies are cumulative.

Bowen, L.J. I am of the same opinion. I think that any other construction of s. 23 would lead to great incongruity. Sect. 18 provides that a composition accepted by the creditors by specified majorities, and approved by the Court, shall bind all the creditors, and that it may be enforced by the Court of Bankruptcy in a summary way, and also that if default is made in payment of any instalment due in pursuance of the composition, the Court may, if it thinks fit, adjudge the debtor bankrupt, and annul the composition.

Then s. 23 enables the creditors to accept a composition after an adjudication of bankruptcy has been made against the debtor,

and thereupon the same proceedings are to be taken, and the same consequences are to ensue as in the case of a composition under s. 18, and the Court, if it approves of the composition, may annul the bankruptcy. What possible reason or convenience is there for drawing a distinction between the two cases, and enabling the Court to enforce the composition summarily in the one case and not in the other? Why should the creditors be entitled to apply to the Court in the one case to enforce the provisions of the composition, and not be entitled to apply in the other, simply because there has been an abortive bankruptcy? Is, then, the language of s. 23 wide enough to incorporate in that section all the provisions of s. 18, including those of sub-s. 10? May it not be fairly said to be a "consequence" of a composition under s. 18 that a creditor is entitled to enforce it by a summary application to the Court? I think that is the fair construction of the words, and that the power to enforce the composition in that way is as much a "consequence" of the composition as the provision that the composition when accepted and approved is to bind all the creditors. If the one is a "consequence" of the composition, it seems to me that the other is equally so. I think the true view of sub-s. 1 of s. 23 is, that it in effect repeats the provisions of s. 18. Sub-s. 3 of s. 23 is almost exactly the same as sub-s. 11 of s. 18, and I think it is expressly repeated out of greater caution, in order that it may not be supposed that, after an adjudication of bankruptcy has been made and annulled, there is no power to make a second adjudication against the debtor.

Fry, L.J. But for the judgment of the registrar I should have thought the case a particularly clear one. Sect. 18 provides that a composition entered into under its provisions shall be capable of being enforced by one of two methods—either by an adjudication of bankruptcy against the debtor, or by an order to pay the composition, obedience to which order can be enforced by process of contempt. I think both these methods are "consequences" of the composition. Then s. 23 provides by sub-s. 1 that "the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition accepted before adjudication." It appears to me that these words give to the creditors

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precisely the same remedies in case of default by the debtor in paying the composition as are given to them in the case of a composition under s. 18. It is argued that this cannot be so, because sub-s. 11 of s. 18 is expressly repeated by sub-s. 3 of s. 23, whereas sub-s. 10 of s. 18 is not repeated. I think there is a perfectly plain reason for the repetition of sub-s. 11. In the case of a composition which precedes the making of an adjudication of bankruptcy no provision for annulling the adjudication was required; but, when a composition is agreed to after an adjudication of bankruptcy, it was necessary to give the Court a power to annul the adjudication, and, the original adjudication having been annulled, the framers of the rule felt that it was desirable to give the Court power in express words to adjudicate the debtor bankrupt again, as it might otherwise be thought that that power would not flow from the mere general provision that the same consequences should ensue as in the case of a composition under s. 18. Rule 211 of the Bankruptcy Rules, 1886, also seems to me to shew very strongly that it was intended to give the Court, under s. 23, this summary power of enforcing the payment of the composition. The case must be remitted to the registrar to deal with it upon its merits. The costs will abide the event.

Appeal allowed.

Solicitor for appellant: *H. E. Robertson.*

Solicitors for debtor: *Nordon & Lazarus.*

W. L. C.

IN RE LOWNDES. EX PARTE TRUSTEE.

1887
March 18;
April 6.

Bankruptcy—Post-nuptial Settlement—Solvency of Settlor at Date of Settlement—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

Upon an application under s. 47 of the Bankruptcy Act, 1883, to set aside a post-nuptial settlement within ten years of its execution, it appeared that if the life interest reserved to the settlor under the settlement were taken into account, he was able to pay his debts at the date of the settlement, but that if it were not taken into account he was insolvent:—

Held, that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was valid as against the trustee in bankruptcy of the settlor.

APPEAL from a county court judge sitting in bankruptcy.

The facts and the arguments are fully set forth in the judgment, and it is only necessary here to state that the question raised between the parties was whether, upon an application by the official receiver, under s. 47 of the Bankruptcy Act, 1883, to set aside a post-nuptial settlement within ten years from the date of it, a life interest reserved to the settlor under the settlement could be taken into account in estimating the solvency of the settlor at the time the settlement was executed.

By s. 47 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the official receiver.

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IN RE LOWNDES. EX PARTE TRUSTEE.

Winslow, Q.C., and *C. H. Turner*, for the trustees of the settlement.

Cur. adv. vult.

April 6. The judgment of the Court (Mathew and Cave, JJ.) was delivered by

CAVE, J. This is an appeal by the official receiver from a judgment of the county court judge of Northampton refusing to declare a post-nuptial settlement void.

In 1880 the bankrupt, who is a clergyman, made a post-nuptial settlement of property he derived from his father, reserving to himself a life interest in the fund. In 1881 the bankrupt made a further settlement of property, which he derived from his brother, and under this settlement also he took an estate for life; and it is this second settlement which the official receiver seeks to set aside under s. 47 on the ground that it has not been proved that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement. When the second settlement was executed the settlor owed 1800*l.* The value of his life-interest under the first settlement was 1000*l.*, and the value of his life-interest under the second settlement was about 1350*l.*, or a total of 2350*l.* If, therefore, the value of the bankrupt's interest under the second settlement is to be taken into account, he was able to pay all his debts. If it is to be excluded, he was then insolvent.

For the official receiver it was contended that the plain language of the Act was that the parties claiming under the settlement must prove that the settlor was able to pay all his debts without the aid of the property comprised in the settlement, and that, as admittedly the bankrupt could not do that without taking into account the value of his interest under the second settlement, the case fell within the section. On the other hand it was urged that the section must be taken to be confined to property settled by the bankrupt upon other persons, and that it was absurd to suppose that the legislature meant that the interest the settlor himself took under the settlement, which might be of sufficient value to pay his debts many times over, was to be excluded.

It is important to see what the course of legislation on the subject has been. By the 1 Jac. 1, c. 15, s. 5, it was enacted "That

if any person which hereafter is or shall be a bankrupt by intent of this statute shall convey or procure or cause to be conveyed to any of his children or other person or persons, any manors, lands, tenements, hereditaments, offices, fees, annuities, leases, goods, chattels, or transfer his debts into other men's names, except the same shall be purchased, conveyed, or transferred for or upon marriage of any of his or her children, both the parties married being of the years of consent, or some valuable consideration, it shall be in the power and authority of the commissioners on this behalf to be appointed, or the more part of them, to bargain, sell, grant, convey, demise, or otherwise to dispose thereof in as ample manner as if the said bankrupt had been actually seized or possessed thereof, or the debts were in his own name, of the like estate or interest to his or their own use, at such time as he or she became bankrupt; and that every such grant, bargain, sale, conveyance, and disposition of the said commissioners, or of the greater part of them, shall be good and available to all intents, constructions, and purposes in the law against the offender or offenders, his heirs, executors, administrators and assigns, and such children and persons as shall be subject to this statute, and against all other person and persons claiming by, from, or under such offender or offenders or such said other persons to whom such conveyance shall be made by the said bankrupt or by his means or procurement." This section seems only to have applied to interests conveyed to the children or other persons; for any estate vested in the bankrupt himself by the settlement would pass on his bankruptcy to the commissioners, and would be sold by them without the aid of this section. By the 6 Geo. 4, c. 16, s. 73, it was enacted, "That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children or for some valuable consideration) have conveyed, assigned, or transferred to any of his children or any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons

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claiming under him." The same reasoning seems to apply to this enactment and also to the similar enactment contained in the 12 & 13 Vict. c. 106, s. 126. The enactment contained in the Act of 1869, s. 91, is, so far as the present purpose is concerned, similar to that of the Act of 1883, except that it was confined to traders.

A settlement which leaves the settlor still able to pay his debts, although his means of paying them may be in part derived from the interest he takes under the settlement, can hardly be supposed to be within the meaning of the enactment. Suppose a young man, having no property but an estate tail in remainder on the death of his father in large landed property, does what is very common, viz.: at his father's request joins in resettling the property, reserving to himself on the settlement a life estate only, could it be contended that the settlement might be avoided on his becoming bankrupt within ten years simply on its being shewn that he owed at the time 1000*l.* or so which he could not pay without taking into account the value of his interest under the settlement, which might amount to many thousands of pounds? It is true that in this case the effect of the settlement was to give the bankrupt only a life estate which would expire with him; but can that make any difference? It was admitted that the value of the bankrupt's life interest under the settlement of 1880 was to be taken into consideration, yet that was a contingent interest only, for it was dependent on his outliving his father, who did not die till 1880. It seems to us that the section must be read to mean "without the aid of the property which by the settlement passes to other persons." In this case what the settlor really settled was the reversion expectant on the termination of his life estate; and it can hardly be supposed that the law intended to prevent his disposing of the surplus when he retained what was more than sufficient to pay all his debts. Had the settlor's property been divided among his creditors on the morrow of the settlement there would admittedly have been more than sufficient to pay every creditor 20*s.* in the pound. The settlor was not a trader, and it has never been suggested that he had any intent to delay or defeat his creditors.

A second point was taken involving a still more harsh construction of this section. It was argued that the settlement was void on the ground of the interest of the settlor not having

passed to the trustees of the settlement on the execution thereof, because the settlor's life interest, and also the interest given to his wife, was limited to them directly without the interposition of trustees, or at any rate with the interposition of trustees who simply acted as conduit-pipes, taking themselves no estate in the property settled. It is difficult to state this objection intelligibly. What the law was intended to prevent was a settlement to operate in futuro, a covenant, for instance, to settle specific property which the trustees could have enforced against the trustee in the case of the settlor's bankruptcy. According to the contention on behalf of the official receiver, a settlement would be void on the settlor's becoming bankrupt within ten years, no matter how solvent he might have been at the time, if the settled property passed directly to any of the beneficiaries without the intervention of the trustees appointed to preserve the interest of the remaining beneficiaries. A settlor owing £1000, and possessed of property worth £10,000, settles one-tenth of it in such a way that he gives his wife directly an interest for her life, and after her death the property is to go to trustees for the benefit of his children. It is contended that such a settlement is within the section, because the interest the wife takes does not pass to the trustees but goes to her directly, and the interest which the trustees do take does not come into possession until the death of the wife. We think it sufficient to state the proposition, which appears to us to carry its own refutation on the face of it. In such a case the whole interest which the settlor parts with passes on the execution of the deed. The wife's interest vests in possession on the execution of the deed. The remainder to the trustees is vested on the execution of the deed. The settlor retains nothing. How can it possibly be said that that is within the mischief at which the section is aimed, or even within its natural and plain meaning. In our opinion the judgment of the Court below was right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for Official Receiver: *Solicitor to the Board of Trade.*
Solicitors for the trustees of the settlement: *Reader & Hicks.*

W. J. B.

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April 23.

IN RE JACK.

Bankruptcy—Transfer of Proceedings—Notice to Official Receiver—Bankruptcy Rules, 1886, *r.* 18.

Notice of an application to transfer the proceedings in a bankruptcy from a county court to the High Court, or vice versâ, must be served upon the official receiver.

THIS was an ex parte motion on behalf of the trustee in the bankruptcy of Arthur Jack for an order to transfer the proceedings from the County Court at Cheltenham to London.

The bankrupt filed his petition in the County Court at Cheltenham, and was adjudicated a bankrupt thereon. The bulk of the creditors were in London. The public examination of the bankrupt was adjourned with the sanction of the official receiver of the county court, the creditors present, and the bankrupt, in order that an application might be made to the High Court for a transfer of the proceedings to London. These facts were deposed to by the trustee in bankruptcy in his affidavit filed in support of the motion.

Sidney Woolf, for the motion.

[CAVE, J. Has notice of this application been served upon the official receiver of the county court?]

No. It is submitted that under the circumstances it was unnecessary. The trustee deposes that the application is made with the consent of the official receiver.

CAVE, J. That is not sufficient. It is desirable to lay down a general rule in these cases. Notice of this application must be served upon the official receiver, and the matter may be mentioned again next Saturday.

Order accordingly.

Solicitors: *Lewis & Lewis.*

H. L. F.

COOK *v.* THE NORTH METROPOLITAN TRAMWAYS COMPANY. 1887 *March* 26.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 8 —*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Otherwise engaged in manual labour*"—*Driver of Tramcar.*

The driver of a tramcar is not "a person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880.

ACTION under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

The plaintiff was employed by the defendants as the driver of one of their tramcars, and brought an action for injuries sustained by him through falling into a hole in the floor of a shed in which the defendants' cars were kept.

At the trial in the Shoreditch County Court the judge, on the authority of *Morgan* v. *London General Omnibus Co.* (1), held that the action was not maintainable, and gave judgment for the defendants on the ground that the plaintiff was not "a person to whom the Employers and Workmen Act, 1875, applies," and that he was therefore not entitled to sue under the Employers' Liability Act, 1880. (2) The plaintiff appealed.

Crispe, for the plaintiff. If the plaintiff is not within the terms specially mentioned in the definition clause of the Employers and Workmen Act, 1875, he is at all events a person "otherwise engaged in manual labour" within the meaning of that clause. The case of *Morgan* v. *London General Omnibus Co.* (1), where an omnibus conductor was held not to be within the Act, is distinguishable; the driver has to perform many acts of manual labour, such as holding the reins, shifting the

(1) 12 Q. B. D. 201; 13 Ibid. 832.

(2) By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 8, "the expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10, "the expression 'workman' . . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . . has entered into or works under a contract with an employer. . . . ."

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horses, and putting on the break, which a conductor has nothing to do with. He was substantially engaged in "manual labour," for if his hands were injured, he could not drive. In *Reg.* v. *Wortley* (1), a bailiff who was hired to take charge of glebe lands at a yearly salary was held to be a labourer, although part of his duties consisted in receiving moneys and accounting for them to his employer.

R. Vaughan Williams, (*Gill*, with him), for the defendants. In *Reg.* v. *Wortley* (1) the prisoner was clearly within the class of persons contemplated by the statute, and the question was whether payment by salary instead of wages took him out of it. There is a limitation which must necessarily be imposed on the meaning of the words "manual labour," and that limitation is found in the judgments in *Morgan* v. *London General Omnibus Co.* (2)

[He was stopped.]

A. L. SMITH, J. It is manifest from the interpretation clause of the Employers and Workmen Act, 1875, which is substantially made a part of the Employers' Liability Act, 1880, that the latter Act was only intended to apply to a class, limited by that clause. A driver is clearly not within any of the terms specially mentioned in the section, but it is said that he is "otherwise engaged" in manual labour. The expression used, it should be noted, is not manual work, but manual labour, for many occupations involve the former but not the latter, such as telegraph clerks, and all persons engaged in writing. I cannot see the distinction between driving and other occupations which involve no manual labour though they do involve manual work. Had the legislature intended to include coachmen they would have included them among the specific instances; that not having been done, I think that "otherwise engaged" can only include persons engaged in manual labour ejusdem generis with that specially mentioned. I assent to the opinion of the Master of the Rolls in *Morgan* v. *London General Omnibus Co.* (3), that we must look at what was the real substantial business of the plaintiff, and I think that we cannot hold this man entitled to recover

(1) 21 L. J. (M.C.) 44. (2) 12 Q. B. D. 201; 13 Ibid. 832.
(3) 13 Q. B. D. 832.

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without practically differing from the judgment of the Court of Appeal in that case.

GRANTHAM, J. I am of the same opinion. It is difficult to define the line beyond which a man fails to come within the definition clause, but I think a fairly satisfactory distinction may be drawn between those whose labour is continuous and requires no application of thought and those whose labour requires the application of a certain amount of thought and skill. The plaintiff comes within the latter class, and is not within the provisions of the Act.

Appeal dismissed.

Solicitor for plaintiff: *E. J. Ward.*

Solicitor for defendants: *H. C. Godfray.*

W. J. B.

[IN THE COURT OF APPEAL.]

March 21.

THOMAS *v.* QUARTERMAINE.

Master and Servant—Defect in Condition of Works—Volenti non fit injuria—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

The plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly so that he fell back into the cooling vat and was scalded. In an action under the Employers' Liability Act, 1880:—

Held (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), that the defence arising from the maxim volenti non fit injuria had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of negligence arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover.

APPEAL from a judgment of Wills and Grantham, JJ. (1)

The plaintiff, who was employed in the brewery of the defendant, sought to recover damages under the Employers' Liability Act, 1880, for injuries received from a fall into a cooling

(1) 17 Q. B. D. 414.

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vat, on the ground that the defendant had been negligent in not fencing the vat.

It appeared that a boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage, which was in one part only three feet wide, ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff, who was employed in this room, went along this passage in order to get from under the boiling vat a board which was used as a lid. As this lid stuck, the plaintiff gave an extra pull, when it came away suddenly, and the plaintiff, falling back into the cooling vat, was severely scalded.

The county court judge held that there was evidence of a defect in the condition of the works at the defendant's brewery in there being no sufficient fence to the cooling vat, he found that the condition of the vat was known to both the plaintiff and the defendant, that the plaintiff had not been guilty of contributory negligence, and he gave judgment for the plaintiff for 75*l*.

The Divisional Court set aside this judgment, and directed judgment for the defendant.

The plaintiff appealed.

Jan. 25. *Crump, Q.C.* and *T. H. Richmond*, (*Hodson*, with them), for the plaintiff. In order to disentitle a servant from suing there must be negligence on his part. Continuing the work with knowledge of the existence of the danger does not amount to negligence, the knowledge is only a fact in the case for the jury to consider: *Clarke* v. *Holmes*. (1) Sect. 2, sub-s. 3, is inconsistent with the idea that mere knowledge is to be a defence, because it assumes knowledge and throws on the servant the duty of informing the master, unless the latter is already aware of the defect. Contributory negligence is still open as a defence, but since the Employers' Liability Act no independent defence can be based on the maxim volenti non fit injuria, nor on any implied contract of the plaintiff to take on himself the known risks of the employment: *Stuart* v. *Evans* (2); *Weblin* v. *Ballard*. (3)

(1) 7 H. & N. 937; 31 L. J. (Ex.) 356. (2) 49 L. T. (N.S.) 138.
(3) 17 Q. B. D. 122.

W. Graham, and *E. P. Hewitt*, for the defendant. The effect of the Act is that there can be no cause of action in the case of a servant unless under the like circumstances a stranger would have a cause of action. There can be no negligence without a breach of duty, but neither by contract nor at common law was there any duty from the defendant to the plaintiff to fence this vat: *Indermaur* v. *Dames* (1); *Lax* v. *Corporation of Darlington* (2); *Wilkinson* v. *Fairrie*. (3) The danger was not hidden, and was known to the plaintiff, who voluntarily undertook the risk, and the defendant would not have been liable before the Act: *Woodley* v. *Metropolitan District Ry. Co.* (4)

[They cited also *Brooks* v. *Courtney* (5); *Britton* v. *Great Western Cotton Co.* (6)]

Crump, Q.C., in reply.

Cur. adv. vult.

March 21. LORD ESHER, M.R. In this case an action was brought by a man employed at a brewery against his master for damages for injury received by the plaintiff by reason, as alleged, of the negligence of the master, such negligence coming within the matters mentioned in the Employers' Liability Act, 1880. The case made out was, that the master was owner of a brewery, in which was a vat full of scalding fluid, round this there was a rim of low height, and near it a boiling vat, from under which the plaintiff attempted to pull a board which came out more quickly than he expected, so that he fell back into the scalding fluid and was injured. The case was tried in the county court, and the judge held that there was a defect in the condition of the works, and that the plaintiff was not guilty of contributory negligence. There is no appeal on a question of fact, and therefore if there is any evidence on which the findings of the learned judge can be supported they must stand good. It is said that there was no evidence of liability on the part of the defendant, and the case in support of this is put in different ways. First, it is said that there was either no negligence on the part of the defendant, or else that if there was there was conclusive evidence

(1) Law Rep. 1 C. P. 274; 2 C. P. 311.
(2) 5 Ex. D. 28.
(3) 32 L. J. (Ex.) 73.
(4) 2 Ex. D. 384.
(5) 20 L. T. (N.S.) 440.
(6) Law Rep. 7 Ex. 130.

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of contributory negligence on the part of the plaintiff, or else it is said that there is some position of the plaintiff irrespective of the questions of negligence of the defendant, or contributory negligence of the plaintiff, which disentitles him to succeed. The first thing to consider is what is the true construction of the Employers' Liability Act, 1880. It has been suggested that this Act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defence. It was, no doubt, held that a servant could not sue a master for injuries arising from the negligence of a fellow-servant, but it was also held that a man who went into any employment undertook to take all the ordinary risks incident thereto, unless they were concealed or were known to the master and not to the servant. It seems to me clear that the Act has taken away that defence from the master. I can see no difference between contracting to take a risk upon oneself and undertaking an employment to which risk attaches. No one ever suggested that there could be such a contract in the case of any person other than a servant, so that when a servant is put on a footing with other persons that defence of the master is gone. The case is reduced, therefore, to a personal action founded on negligence. It is said you cannot have liability for negligence except it is founded on a duty. The duty, however, is, that you are bound not to do anything negligently so as to hurt a person near you, and the whole duty arises from the knowledge of that proximity. Whether the negligence is your personal act, or arises from using your property in a particular way, the rule equally applies, and you must so use your personal powers or property as not to injure any other person if by the exercise of reasonable care you can avoid so doing.

In an action for injuries arising from negligence it always was a defence that the plaintiff had failed to shew that as between him and the defendant the injury had happened solely by the defendant's negligence. If the plaintiff by some negligence on his part directly contributed to the injury, it was caused by the joint negligence of both, and no longer solely by the negligence of

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the defendant, and that formed a defence to the action. It seems to me that the Act recognises, if it does not impose, a duty on the part of the master not to have his ways, machinery, or plant in such a defective condition as to cause injury to the servant, and if he fails in this he is not at liberty to set up that the injury arose by the negligence of a fellow-servant of the plaintiff, nor that the plaintiff, whether he knew or did not know of the defect, had contracted that he would take the risk on himself. The question, therefore, is, was the master negligent in allowing a defect to exist in the works by reason of which defect the injury has arisen, and if that is established, was the plaintiff guilty of negligence directly contributing to the injury he has sustained? Unless it can be made out that mere knowledge of the plaintiff of the existence of the defect is a defence to the action, we have no right to look into the findings. To my mind it is conclusively shewn that there was a defect, that is, such a condition in the works as produced a danger, and that it was of such a nature that the master or the person entrusted with the superintendence must have known of the existence of the defect. With regard to the plaintiff, there was no evidence that when he entered into a contract with his employer he knew of the state of the works, and therefore he cannot be said to have either expressly or impliedly contracted to run the risk. It is said, however, that he had been a long time there, and must have known of the risk. Take it that he did. Is that, standing alone, something which prevents his recovering. I never heard the matter so put, and it seems to me that s. 2, sub-s. 3, of the Act shews that the legislature did not adopt any such view, because in that clause the case is contemplated in which both the workman and his master know of the defect. The section says that a workman is not to have a right of compensation "in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence," so that it is assumed that the servant may recover if he gives information or if the master already knows. I cannot see, there-

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fore, that the knowledge of the plaintiff absolves the defendant from any duty. It is put in argument that the duty of the master is either to take reasonable care that there shall be no defect, or to tell the servant that he does not mean to do so. To me it seems an unnatural doctrine that merely telling the servant of the defect should absolve the master from liability, and unless there is some authority that binds me to accept it I cannot do so. Is it true to say that the mere knowledge of the servant that the master is not going to take care that there is no defect or danger makes the continuance of the servant at the work evidence of negligence on his part? Are there not innumerable instances which negative this, as, for instance, if the servant, in spite of the danger, does any act tending to save life or to the protection of his master's property? I protest against its being said that a jury are bound to find that there is negligence in such case on the part of the man who runs a risk. The knowledge of the plaintiff of the want of care of the defendant is not conclusive against the former, though it is a material fact for the consideration of the jury in determining whether, under all the circumstances, the plaintiff was guilty of contributory negligence. The case of *Clarke* v. *Holmes* (1) has been observed upon, but it has never been overruled, and it seems to me to be this case. It is binding on us, and, moreover, it is in my opinion rightly decided, and in each of the judgments I find it laid down, that knowledge is only a fact in the case to be taken into consideration by the jury with all the other facts and circumstances in determining the question whether the plaintiff has himself helped to bring about the accident, in respect of which he seeks to charge the defendant. I cannot see that any of the other cases adversely affect these observations. The fact, then, of the knowledge of the servant is not conclusive against him. It is said that there is a difference which arises where there is a statutory duty thrown on the master to fence machinery, but it seems to me that exactly the same question arises, and I cannot accede to that argument. I think, then, that there was evidence to support the finding that the defendant was negligent, that being so, it was a matter of fact for the judge, with which this Court has no right to interfere,

(1) 7 H. & N. 937; 31 L. J. (Ex.) 356.

and, admitting the knowledge of the plaintiff, it seems to me that to say that that fact excused the defendant from the effect of his negligence is erroneous and contrary to the law. I think, therefore, this appeal ought to be allowed.

The following judgment was read by

BOWEN, L.J. Our decision to-day is one of great importance to employers and workmen, and for this reason I regret to find myself unable to agree with the Master of the Rolls, to whose experience and authority every lawyer must be disposed to defer. But I have formed a definite judgment upon the matters of law now raised, and I am bound to give effect to it—however natural it would be to me to follow his opinion in place of my own.

Two alternative views have been submitted to us as to the effect of the Employers' Liability Act, 1880. Is the true conclusion that the Act has removed certain special obstacles to a workman's right to sue which would not have existed in the case of other persons, and which had been held previously to arise by implication out of the relation of master and servant; and that the Act has only placed an injured workman (as regards his remedies) in the same position (with specified exceptions) as he would have occupied if he had not been in the master's employ? Or has the Act gone further, and imposed on masters new duties and liabilities towards their servants which the masters would not be under towards the general public or the servants of anybody else. This is the first question we have to solve.

For his own personal negligence a master was always liable and still is liable at common law both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned. But in the case of injuries arising out of another servant's negligence, the workmen stood before recent legislation at a disadvantage as compared with the world outside. For damage done by the negligence of his servants acting within the scope of their employment, the master, on the principle of respondeat superior, was responsible to strangers. But a workman injured by the negligence of a fellow-workman had no such redress. By entering into a contract of service the common law inferred that he had taken on himself

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the ordinary risks incident to such business as was lawfully carried on upon his master's premises; and the much-canvassed case of *Priestley* v. *Fowler* (1), and a series of decisions following in its train, had engrafted on this doctrine the grave corollary that the negligence of a fellow-servant in the common employ of the master was one of such ordinary risks. The corollary gave rise to much apparent hardship and to much debate. In the year 1880 the legislature passed the Employers' Liability Act, which we have to construe, and it is now necessary to decide to what extent legislation has altered as between master and servant the common law, as by virtue of the decisions of the Courts it stood prior to this date.

Sect. 1 of the statute provides that: "Where personal injury is caused to a workman by reason of any defect in the condition of the employer's works," and in four specified instances by reason of negligence of others in the employer's service, "the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." Does this language do more than remove such fetters on a workman's right to sue as had previously been held to arise out of the relation of master and workman? The express words of the section seem to permit of only one answer to this inquiry. An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition. It cannot in the case of a defect in the employer's works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that if the Act had intended to prescribe some new measure of duty, the least one might expect would be that it should define it. What sort of duty could that be which does not exist at law, and which is not defined by statute? It would

(1) 3 M. & W. 1.

be a duty that had no limits except the benevolence of a jury exercised at the expense of the pockets of other people.

An extension of the plain language of s. 1 has been sought in the argument addressed to us to be extracted from expressions in the third clause of s. 2, which appear to assume that but for the controlling limitations of the latter section, the master, under s. 1, would have been left liable to be sued for some defects in his works of which the workmen and he had both of them a knowledge. This, it was argued, indicates that the 1st section of the Act was intended to stretch the liability of the master for defects on his premises beyond what would have been his liability to persons other than his own servants. To this objection there are three answers. The first, that clause 3 of s. 2 is part of a provision that purports to limit an employer's liability, not to extend it; and it would be strange, except in a case of necessity, to evolve out of the language of a clause that limits liability a reason for extending the clear words of a previous section in which the liability has been defined. The second answer is, that clause 1 of s. 2 has already in the plainest language provided that the master is not to be liable unless for defects that arise through or have remained undiscovered or unremedied owing to the negligence of the employer or his other servants; or, in other words, that there must have been a breach of duty before any action will lie. The third answer is, that in the case of the outside world there are and always have been defects caused by negligence in a master's premises for which the master would be liable even when both he and his visitors knew of them. Defects caused by the neglect of some statutory provision to the benefit of which the person using the premises is entitled—and defects, lastly, caused by the negligence either of master or servant of which the injured person had not really taken on himself the risk, are examples to which clause 3 would at law apply, and there is no necessity to travel into the region of indefinite conjecture, and to imagine freshly created duties of an employer to account for the language of the clause. The true view in my opinion is that the Act, with certain exceptions, has placed the workman in a position as advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business. If it has

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created any further or other duty to be fulfilled by the master I do not know what it is, how it is to be defined, or who is to define it.

In the present instance the injured person has fallen into a more or less unfenced vat open to view, in a room in which he had been at work for many months; the full danger and risk of which were as well known to himself as to his master or to any one else upon the premises. The county court judge has found that the plaintiff knew, but has added a further finding that the plaintiff was guilty of no contributory negligence. We have to apply the Employers' Liability Act of 1880 to this simple state of facts. Treat the plaintiff as freed from all fetters that would have arisen by implication out of his contract of service, view him on the hypothesis prescribed by the Act, as if he were not a workman, place him in the category, most favoured by the law, of a visitor invited by the employer to come upon premises on business of the employer's own: what, on the above findings and on the undisputed facts, would be his legal position as regards redress for the accident that has happened to him?

He would, on the prescribed hypothesis in the case of such an accident, have to prove two things in order to succeed. The first, that the defendant had been guilty of some negligence, that is to say, of some breach of duty towards the plaintiff himself. The second, that the defendant's negligence had been the proximate cause of such accident; that there had not merely been incuria, but incuria dans locum injuriæ. Whether there has or has not been contributory negligence is, to speak precisely, only a branch of this second inquiry. Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause.

In order to answer the first inquiry, whether the defendant had been guilty of negligence, the first step to be taken must be to consider what is the duty towards the plaintiff that it is alleged the defendant has broken—for the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody. The common

law imposes on the occupier of premises no abstract obligation at all as to the state in which he is to keep them—provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that contain an element of danger, a duty arises as soon as there is a probability that people will go upon them: but it is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons from being hurt. It is obvious that this duty must vary according to the character of the danger, and the circumstances under which the premises are to be visited. It differs in the case of hidden dangers, and the case of dangers that are palpable and visible: it may vary according to the age and comprehension of the visitor: in the case of bare licensees, and of those who come on the premises on the occupier's business and at his invitation. The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief, and this is but the adaptation to a special case of the general doctrine sic utere tuo ut alienum non lædas.

In the absence of any further act of omission or commission by the occupier of the premises, or his servants, or of any disregard of statutory provisions, or of individuals' rights, can it properly be said that there has been upon his part any breach of duty towards a person who, knowing and appreciating the danger and risk, elects voluntarily to encounter them. I employ a builder to mend the broken slates upon my roof, and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had its slates mended? In the case now before us the negligence relied on by the plaintiff is that a vat in the room in which he worked was left without a railing. Let us suppose that the defendant, impressed with the danger, had actually sent for a builder to put one up, and the builder had fallen in while executing the work. Would the defendant have been guilty of a breach of duty towards the builder? The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk. Volenti non fit injuria.

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This is not new law: it is as old as the Roman Digest, and has been accepted by the Courts of this country. "That," says Cockburn, C.J., in the Court of Appeal, in *Woodley* v. *Metropolitan District Ry. Co.* (1) "which would be negligence in a company with reference to the state of their premises or the manner of conducting their business so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one who being aware of the danger voluntarily encounters it and fails to take the extra care necessary for avoiding it." "If a person,"—say the Court of Exchequer Chamber in the leading case of *Indermaur* v. *Dames* (2),—"enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger?" It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not "*scienti* non fit injuria," but "*volenti*." It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk: as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke* v. *Holmes* (3) is a case of that sort, and has been so explained subsequently by judges of authority. Or again the plaintiff may have a common right or individual right at law to find these particular premises free from danger, as in the case

(1) 2 Ex. D. 384. (2) Law Rep. 1 C. P. 274; 2 C. P. 311.
(3) 7 H. & N. 937; 31 L. J. (Ex.) 356.

of lands on which a market or fair has been held: *Winch* v. *Conservators of the Thames* (1); *Lax* v. *Corporation of Darlington.* (2) The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete.

In finding that the defendant was guilty of no contributory negligence, the county court judge has left untouched the above defence, which is outside the principle of contributory negligence altogether. Contributory negligence arises when there has been a breach of duty on the defendant's part, not where ex hypothesi there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that under the old form of pleading the defence of contributory negligence was raised, in actions based on negligence, under the plea of "not guilty." It was said, and said rightly, in *Weblin* v. *Ballard* (3), that in an inquiry whether the plaintiff has been guilty of contributory negligence, the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care. But the doctrine of volenti non fit injuria stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two

(1) Law Rep. 9 C. P. 378. (2) 5 Ex. D. 28.
(3) 17 Q. B. D. 122.

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ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defences, but the importance of the distinction was pointed out both by Erle, C.J., in his summing up to the jury in *Indermaur* v. *Dames* (1), and by Cockburn, C.J., in *Woodley* v. *Metropolitan District Ry. Co.* (2) To prove negligence it is not enough to shew that the defendant has been negligent to others, the plaintiff must shew that there has been a breach of duty towards himself. These two defences, that which rests on the doctrine volenti non fit injuria and that which is popularly described as contributory negligence, are quite different, and both, in my opinion, are left open to an employer, if sued under the Employers' Liability Act of 1880. Neither of these is a defence that merely arises by implication out of the workman's contract of service. A confusion in applying the first of these two broad principles to the special case of master and servant has at times arisen out of the fact that by the contract of service the workman was deemed to have taken upon him the ordinary risk of a business lawfully carried on upon his master's premises, and it has been assumed as an à fortiori case that he took upon himself such risks as were visible or known. This is one way of putting such a defence, and may in many cases be sufficient, but there is another way of stating it and another principle wholly independent of contract on which a similar defence arises. The law is full of instances where duties assume a double aspect and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect and to receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best

(1) Law Rep. 1 C. P. at p. 277. (2) 2 Ex. D. 384.

treated as arising by implication from the contract or from the general law outside; and down to the Employers' Liability Act, 1880, it may have been less important in the case of visible and apparent risks, which explanation of the master's immunity was given. The Employers' Liability Act of 1880 makes precision on this point necessary, and renders it important to remember that quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person. The county court judge in the case now under appeal, while negativing contributory negligence, has found the issue of "knowledge" against the plaintiff. In what sense must this finding be read, having regard to the undisputed facts? Knowledge, as we have seen, is not conclusive where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered, but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk. There was, therefore, in my opinion, no evidence of negligence on which the county court judge could act, and therefore the appeal should be dismissed with costs. I gather indeed that the view of the law which I have taken is that which the Court below, and certainly Wills, J., would have acted upon had they not considered themselves hampered by the authority of *Weblin* v. *Ballard*. (1) As to that case I will only remark that the Court really appear to have assumed negligence against the employer and to have directed their attention to the inquiry as to contributory negligence. If the decision, however, really conflicts, and I am not sure that it may not in fact conflict, with the view of the law which I have expressed, I think *Weblin* v. *Ballard* (1) ought to be overruled.

(1) 17 Q. B. D. 122.

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The following judgment was read by

FRY, L.J. The plaintiff in this case was a workman at weekly wages of the defendant. The plaintiff fell backwards into a vat of heated liquid by reason of a board at which he was pulling suddenly yielding to his efforts: the vat had a low defence which had been placed there seven months before the accident, during the whole of which time the plaintiff had worked for the defendant: if the defence had been higher the plaintiff could not have fallen into the vat: in that sense there was a defect in the plant connected with the defendant's works. I agree with the learned county court judge in his finding that the plaintiff and defendant both knew of the defect in the works, for the evidence I think shews that the alleged defect and the danger, such as it was, which resulted from that defect were perfectly patent, and were in fact as well known to the plaintiff as to the defendant, and that the plaintiff continued to work for the defendant with this full knowledge on his part. I am of opinion that independently of the Employers' Liability Act, 1880, the plaintiff could not have sustained his action. The decision of this Court in *Griffiths* v. *London and St. Katharine Docks Co.* (1) shews that the allegation of the servant's ignorance was as essential to such an action as that of the master's knowledge: and such an allegation could not in the present case have been sustained.

Then arises the question which seemed to me to be that of the greatest difficulty in this case, viz., has the plaintiff a right of action by force of the Act of 1880?

The 1st section provides that when personal injury is caused to a workman by reason of any one of five things enumerated, the workman shall have the same right of compensation and remedies against his employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.

If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation. Can such a person maintain an action in respect

(1) 13 Q. B. D. 259.

of an injury arising from a defect, of which defect and of the resulting damage he was as well informed as the defendant? I think not. To such a person it appears to me that the maxim volenti non fit injuria applies. In the case of *Woodley* v. *Metropolitan District Ry. Co.* (1) this point arose because the plaintiff was a workman in the employ not of the defendants but of a contractor with the defendants: and in delivering judgment in the Court of Appeal, Cockburn, C.J., used the language which has been already cited by Bowen, L.J., and in so doing adopted the view forcibly expressed by Cleasby, B., in the Court of Exchequer. In that view of the learned Lord Chief Justice and of the learned Baron I venture to concur. If I invite a man who has no knowledge of the locality to walk along a dangerous cliff which is my property, I owe him a duty different to that which I owe to a man who has all his life birdnested on my rocks.

But again, s. 2, sub-s. 1, provides that the workman cannot maintain his action when arising from a defect in the ways or plant unless the defect arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in his service as therein mentioned. Was there, then, in the present case any negligence, i.e., any breach of a duty which the defendant owed to the plaintiff? And how are we to determine what duty the defendant owed the plaintiff? In my opinion it must be determined by considering the real relation between the parties, i.e., the relation of this particular master to this particular servant. The duty which a master owes to one servant may be quite different to that which he owes to another: it may vary with the knowledge, the experience, the skill, and the powers of the workman. In the present case I think that the master owed no duty in respect of the vat in question towards a workman who voluntarily continued to work on the property with a full knowledge of the defect and of the danger thence resulting.

That the inquiry must in every case be as to the duty of the master to the particular servant is, to my mind, well illustrated by an observation which I find in Messrs. Roberts and Wallace's Essay on the duty and liability of employers, 3rd ed., p. 252.

"The defect, then, must be shewn to owe its existence at the

(1) 2 Ex. D. 384.

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time of the accident to negligence, that is to say, to a breach of duty. Moreover, the duty which has to be considered is the duty which is owed to the injured workman, and may be quite different from that which is owed to the rest of the employer's servants. Suppose that, altogether through the carelessness of the employer or of the persons entrusted with the duty of looking after the ways, &c., a foot-bridge becomes and is allowed to remain in a defective and dangerous condition, so that a workman who is injured whilst using the bridge in the course of his duty and ignorant of its condition would clearly have a right to sue the employer in the first case at common law or under the Act, and in the second under the Act. Then, suppose that the employer, or one of the persons entrusted with the duty, determines to put an end to the danger and directs a workman to repair the bridge, telling him that it is in a dangerous condition. Now, whether this workman be one of the employer's regular staff or a jobbing workman called in for the occasion, it is clear that quà this operation there has been no breach of duty to him, and therefore no negligence. He cannot be heard to complain of the bridge being defective, inasmuch as that very thing is the cause of his being there, and he undertook to set it right, being paid for the risk he ran and voluntarily incurring it."

There are two matters which often arise for discussion in these cases of negligence which are, I think, liable to be confused, and yet are inseparable in reason. The one is the willingness of the plaintiff to assume the danger; and this willingness, if assumed with full knowledge, may lessen or remove any duty of the employer to the employed, and may thus prevent the arising of any cause of action, though in the discharge of the work undertaken the workman may have been guilty of no negligence. The other is the negligence of the plaintiff which may have placed him in circumstances of difficulty or danger, or which, when he is placed in such circumstances, may have contributed to the injury. Here there may have been no willingness to enter on the danger but negligence when in it. In both these questions, the knowledge of the plaintiff may be a material ingredient. But the questions are nevertheless distinct.

For the reasons I have given I think that there was no negli-

gence of the defendant from which the defect arose or which was the cause of its not being discovered or remedied; and on this ground I think that the defendant is not liable.

The 3rd sub-section of the 2nd section of the Act at first sight creates some difficulty in this conclusion. But when looked at more carefully I think that this section does not really conflict with the conclusion at which I have arrived. Knowledge is not of itself conclusive of the voluntary character of the plaintiff's actions: there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory obligation to fence machinery; and it is, I think, abundantly plain that the 2nd section is not intended to create any new cause of action or to have any effect other than that of putting a fetter on the right of action created by the 1st section.

In a word, then, my opinion is that the statute was intended to place the workman in the same position as a stranger lawfully on the property by the invitation of the occupier, but in no higher or better position; that the maxim volenti non fit injuria would apply under apposite circumstances to such a person; and that consequently it applies under the like circumstances to a servant suing under the statute. Further, I think that on the whole of this case there was no evidence to support the finding of the county court judge that there was a defect in the ways due to the negligence of the defendant. Taking this view of the Act it is not necessary for me to express any opinion on the question whether there was any defect in the plant or way in question. I will only observe that neither the case of *Heske* v. *Samuelson* (1) nor that of *Cripps* v. *Judge* (2) appears to me to have attempted to lay down an exhaustive definition of what is a defect within the Act; they only held that there is a defect when a machine is unfit for its purpose.

In my opinion this appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *W. F. Summerhays.*

Solicitors for defendant: *Wansey, Bowen, & Co.*

(1) 12 Q. B. D. 30. (2) 13 Q. B. D. 583.

A. M.

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April 27.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE COUNTY COURT JUDGE OF ESSEX AND CLARKE.

*County Court—Judgment Debt—Interest—*1 *&* 2 *Vict. c.* 110, *s.* 17.

A county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17.

Decision of the Queen's Bench Division (ante, p. 638) reversed.

APPEAL from a judgment of Mathew and Cave, JJ., refusing to grant a writ of prohibition to the judge of the County Court of Essex and Arthur Clarke to prohibit them from further proceeding upon an order of the learned judge in an action of *Clarke* v. *Cotton*. The case is fully reported, ante, p. 638.

1887. April 27. *R. Vaughan Williams*, for the appellant, argued as in the court below, and cited *Berkeley* v. *Elderkin*. (1)

T. H. Richmond, for the respondent.

LORD ESHER, M.R. I am of opinion that both upon principle and authority this appeal should be allowed. It must be remembered that when 1 & 2 Vict. c. 110, was passed, there were no such county courts in existence as those created by 9 & 10 Vict. c. 95. At that time a judgment was at common law the end of the action of the Court, though under various statutes the Court might exercise a further jurisdiction as to a judgment already passed; it followed that it was the law, and not the Court, which was called upon to carry the judgment into execution. The law did so by means of the sheriff, who enforced the writ of execution; he was put in motion by the parties, and was a ministerial, not a judicial officer; every step taken after judgment was in fact ministerial. Before 1 & 2 Vict. c. 110, the judgment in an action was only for that which was claimed in the writ, whether it were debt or damages, or any other form of relief then known to the law; and the warrant to the sheriff contained nothing beyond what was in the judgment; it was therefore not an

(1) 1 E. & B. 805.

authority or direction to the sheriff to execute the writ of fieri facias for interest for the non-payment of the judgment. The sheriff could not add anything of his own will, and it required an Act of Parliament to enable him to enforce execution for more than the amount of the judgment; this power was given by s. 17 of 1 & 2 Vict. c. 110, which did not make a new writ of execution, but enacted that in cases under the section, that is to say, judgment debts for such judgments as are entered up, judgment debts should carry interest at 4 per cent., to be levied under the writ of execution. Under that section the judgment is not altered; no new order is to be made after judgment; but the interest necessarily follows the judgment, and is levied in the execution as part of it. The result of this statutory enactment was that the form of the writ of fieri facias was altered, otherwise the sheriff would not have known what to do. The form of the writ shews that it issues for the amount of the judgment—that is, the debt and costs, together with interest; and the form was so drawn that the sheriff might be able to know exactly the sum for which he was entitled to levy. I entertain a strong view that the word "judgment" in s. 17 means such judgments as were then known, judgments which were entered up; and I doubt whether it applied to any but the superior Courts.

Afterwards, by 9 & 10 Vict. c. 95, county courts such as now exist (though their jurisdiction has been much enlarged) were instituted; prior to that time they had no existence; and it must be remembered that s. 17 of 1 & 2 Vict. c. 110, was in operation when these courts were established. By the new Act the county court judges were empowered to make very peculiar orders, very different from a judgment at common law, which followed the writ; sometimes they are called judgments, but generally orders for the payment of money. These orders or judgments were, when necessary, enforced by a writ of fieri facias, which was as purely ministerial in its nature as that in the superior court; and by the terms of s. 94 the sheriff was by the writ authorized to levy "such sum of money as shall be so ordered" (which words apply to the original judgment or order for payment), "and also the costs of the execution." There is not a word in the section about including a sum for interest in the amount to be levied, and to

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justify the high bailiff in so levying the section should expressly have contained the words "and interest," which would have necessitated an altered form of warrant of execution. But the statute carries us further than this; by s. 109 "the sum of money and costs adjudged" is to be indorsed on every warrant of execution, and on payment of that sum by or on behalf of the debtor the execution is to be superseded; not a word is there said about interest, nor in s. 110, which entitles a debtor to be discharged from custody upon payment of debt and costs. These sections throw great light on the meaning of s. 94; and if I were seeking to interpret these two Acts without the assistance of previous authority, I should say that 9 & 10 Vict. c. 95, cannot be construed to give interest upon county court judgments without reading into it words which it does not contain; and I should infer that the legislature, knowing of the existence of s. 17 of the earlier Act, carefully abstained from making its provisions applicable to the substantive Act which they had under consideration.

But the case of *Berkeley* v. *Elderkin* (1), which was not brought to the notice of the Divisional Court, is an extremely strong authority on this very point. That was an action in the superior court upon a county court judgment, and there was a demurrer on the ground that the action would not lie; the demurrer was upheld by the Court of Queen's Bench. Now, had the judgment in the county court been a judgment in the ordinary sense, such a judgment as was then known to the law, the action clearly would have lain. But Lord Campbell says that it was quite clear that the legislature intended to confine the remedy on the judgments of Courts constituted under that Act to the remedies specifically provided in it; and one of his reasons for that opinion must have been that the judgments and orders of county court judges were different from the judgments hitherto known to the law. The additional reason is given by Wightman, J., that a county court judge could alter his judgment while an action was pending on it in the superior court; but Erle, J., gives the conclusive reason that a judgment in the county court is different from an ordinary judgment. This case is an authority for saying that the jurisdiction

(1) 1 E. & B. 805.

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in the county court was absolutely new, and that it resulted in a new kind of decision not of the same nature as an ordinary judgment. The ordinary rule of construction therefore applies in this case, that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued. These decisions in the county courts are not judgments within the meaning of s. 17 of 1 & 2 Vict. c. 110, and the remedies on them are those specifically mentioned in the County Court Acts, and no others.

FRY, L.J. I am of the same opinion. A clear distinction is drawn in 1 & 2 Vict. c. 110, between judgments of the superior Courts of Common Law and of Equity, and of the inferior Courts: and though s. 17 is very general in its language I am inclined to think (though it is unnecessary here to decide it) that it applies to the judgments of the superior Courts of Common Law, and of such inferior Courts of Common Law as then existed. The question then arises whether upon the reconstruction of the county courts by the Act of 1846, the orders of those Courts were made judgments within the meaning of the earlier statute. I do not think they were. The sections of the Act of 1846, which deal with the mode of enforcing the judgment, are wholly silent about interest, and the form of the writ of fieri facias given in that Act is more limited than that in existence in the superior courts, under which interest could be levied on the amount of the judgment debt. The same silence as to interest occurs in ss. 109 and 110 of the Act, and I agree with the remarks of the Master of the Rolls as to the inference to be drawn from this fact. Moreover the case of *Berkeley* v. *Elderkin* (1) shews very clearly that in many important particulars a county court judgment differs very materially from one in a superior Court, and I regret that that case was not cited in the court below. I think we should be doing violence to the express provisions of the legislature if we held this interest to be recoverable, and it is a matter of satisfaction to me that our decision is in accordance with what has hitherto been the uniform practice of the profession with regard to county court orders.

(1) 1 E. & B. 805.

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THE QUEEN v. COUNTY COURT JUDGE OF ESSEX.

LOPES, L.J. I concur. At first I was impressed with the argument that s. 17 of the earlier Act is general in its terms; but upon consideration and upon the authority of *Berkeley* v. *Elderkin* (1) I am clearly of opinion that that section has no application to judgments recovered in the statutory county courts established under 9 & 10 Vict. c. 95. That Act gave a new jurisdiction, a new procedure, new forms and new remedies, and the procedure, forms and remedies there prescribed must, where they have not been altered by subsequent legislation, be strictly complied with. I entirely concur in the language of Lord Campbell and of Erle, J., in the case cited.

Appeal allowed.

Solicitors for appellant: *Sandilands, Humphry, Armstrong, & Jackson.*

Solicitors for respondent: *Peace & Co.*

W. J. B.

March 30.

[IN THE COURT OF APPEAL.]

PIKE, SONS, & CO. *v.* ONGLEY AND THORNTON.

Principal and Agent—Sale of Goods—Broker making Sold-note "for and on account of owner"—Personal Liability of Broker—Evidence, Admissibility of—Usage of Trade to control written Contract.

The defendants, who were hop brokers, gave to the plaintiffs the following sold-note: "Sold by Ongley & Thornton (the defendants) to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales . . . hops . . . (Signed) for Ongley & Thornton, S. T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make the defendants personally liable on the above contract, and tendered evidence to shew that by the custom of the hop trade brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by the plaintiffs to the defendants to name their principal:—

Held (reversing the decision of the Queen's Bench Division) that the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial.

Hutchinson v. *Tatham* (Law Rep. 8 C. P. 482) considered.

MOTION for a new trial or to enter judgment for the defendants on the ground of misdirection and misreception of evidence.

(1) 1 E. & B. 805.

The action was brought against the defendants, who were hop brokers, to recover damages for the non-delivery of hops equal to sample sold under a written contract in the following terms: "Sold by Ongley & Thornton to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales, Hallertau Bavarian hops at 52*s.* per cwt. Delivery in October. (Signed) for Ongley & Thornton, S. T." At the trial before Manisty, J. and a special jury the plaintiffs contended that the defendants were personally liable on the contract, and evidence was tendered to shew that, by the custom of the hop trade in such a contract, if the principal be not disclosed at the time of making the contract the broker is in fact regarded as the principal and is held liable. The evidence was admitted by the learned judge. It was admitted by the parties that the plaintiffs had not asked the defendants for the name of their principal, but there was evidence to shew that the plaintiffs in fact knew that he was a foreigner. The jury found a verdict for the plaintiffs, and judgment was entered in accordance with the finding.

March 16. *Winch*, for the defendants. The defendants having made the contract "on account of" their principal, are not personally liable: *Gadd* v. *Houghton*. (1) The evidence offered to fix them with a primary liability is inconsistent with the written contract, and should have been rejected. In *Hutchinson* v. *Tatham* (2) the custom proved was not one to make the agent primarily liable on such a contract, but to fix him with a personal liability if he did not disclose his principal within a reasonable time. In *Fleet* v. *Murton* (3) the brokers were held personally liable on failure of their principal.

Murphy, *Q.C.*, and *Pyke*, for the plaintiffs. Where a contract is made by a broker as such on behalf of an undisclosed principal, evidence of trade usage is admissible to control the written contract and to make the broker personally liable: *Fleet* v. *Murton*. (3) In *Southwell* v. *Bowditch* (4) the exemption of an agent on a contract of sale "by your order and for your "account" proceeded on the ground that there was no proof of a trade usage

(1) 1 Ex. D. 357.
(2) Law Rep. 8 C. P. 482.
(3) Law Rep. 7 Q. B. 126.
(4) 1 C. P. D. 374.

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to make him personally liable. Where a document is signed without qualification, though there may be limiting words in the body of the instrument, the person signing it is personally liable: *Paice* v. *Walker* (1).

[He also cited *Humfrey* v. *Dale* (2).]

Winch was not called upon to reply.

DAY, J. The document upon which this action was brought is a sale note of the defendants, who purported to sell thereby certain hops to the plaintiffs "for and on account of the owner." The question is whether that contract on the face of it makes the brokers liable as principals, or whether, if that is not so, evidence can be given to vary the contract by shewing a trade custom to treat as principals brokers who have not disclosed the names of their principals at the time of the making of the contract. It is clear from a series of decisions that where the contract sued upon has been made by a broker "for" or "for and on account of" an undisclosed or foreign principal, the broker is not primarily liable. That is the result of the decision in *Gadd* v. *Houghton* (3), where the Court of Appeal held that where the words "on account of" were inserted in the body of a contract, the broker was not personally liable. That case is binding and conclusive, and we must hold that in the present case, where goods have been sold "for and on account of" an owner (the owner not having been named), the brokers are not primarily liable. That is a convenient expression to use. But evidence was in this case tendered to prove a trade custom, and such evidence is often admissible where it is not inconsistent with the contract. The custom here set up was that, if the broker did not disclose the name of his principal, he was himself personally liable. I asked whether the custom was that the principal should be disclosed at the time of the making of the contract, and I gather from the judge's notes and from the answers of counsel that a primary liability would attach to the broker as part of the contract, if that was not done. If that is so, the new term contradicts the written document, which says that the defendants do not contract for themselves,

(1) Law Rep. 5 Ex. 173. (2) 7 E. & B. 266; E. B. & E. 1004.
(3) 1 Ex. D. 357.

but for the owner of the hops, thus excluding all idea of primary liability; until it was shewn that they were the owners, they could not be taken to be so. Therefore I am of opinion that the evidence of custom which was tendered was inadmissible, and that the learned judge at the trial ought to have construed the contract and directed a verdict for the defendants.

WILLS, J. I am of the same opinion. It is clear that the brokers did not, in fact, bind themselves. Although I suggested in the course of the argument that the word "owner" might possibly include the defendants as well as their principal, I think that that construction would be unnatural; it would be unsatisfactory to draw any distinction between the expressions "on account of owner" and "on account of our principal." The natural meaning of the phrase is that the contract is made by the defendants, not in their personal capacity, but as agents for the proprietor, whoever he may be. If so read it means "sold by the defendants for and on account of an undisclosed principal," and on the authorities such a contract does not render the agent liable in the first instance.

Then comes the question whether parol evidence of a custom is admissible for the purpose of shewing that the defendants agreed that they should be held responsible in spite of the contract they had entered into. It may be contended that it was so admissible, if sentences are picked out of the judgments in various cases without reference to the facts on which the decisions turned. In *Humfrey* v. *Dale* (1) Lord Campbell expands the contract by an addition which in no way contradicts its other terms. In this case, if we were to read the written words together with the words which the custom would introduce, the contract would run thus, not "We have sold for our principals," but "We have sold not for our principals, but for ourselves;" that would be a direct contradiction. I think, therefore, that the evidence was inadmissible, and that our proper course is to enter judgment for the defendants.

Judgment reversed.

W. J. B.

(1) 7 E. & B. at p. 276.

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The plaintiffs appealed.

Mar. 30. *Murphy, Q.C.*, and *L. E. Pyke*, for the plaintiffs, argued as in the Court below.

Finlay, Q.C., and *Winch*, for the defendants, contended that the evidence given at the trial (which it is unnecessary to set out in this report) proved a custom to look to the broker as the only principal if the name of the real principal was not disclosed in, or at the time of the making of, the contract, and not to regard the seller as a principal or as being liable on the contract at all, and that such a custom was bad as being in contradiction of the written contract.

Murphy, Q.C., was not called on to reply.

LORD ESHER, M.R. In this case the defendants are clearly not liable upon the contract itself; they were selling as agents for an owner, and in the absence of trade usage no liability would attach to them. The evidence of the witnesses who were called to prove the custom came to this, that if the name of the owner was not given in, or at the time of the making of, the contract, the buyer had the right to treat the broker as principal; and on such a custom I should say that even if the owner's name were disclosed after the making of the contract, the buyer might sue either the principal or the broker. Is it the fair meaning of such evidence to say that where a broker says in the contract that he is acting for a principal, though an undisclosed one, the buyer is to look only to him and not to the real principal? Such a custom would be in direct contradiction of the terms of the written contract, but I can see no reason for supposing that a man having a remedy against two persons would deliberately debar himself of his remedy against one of them. The custom is not wanted in such a case: it is only wanted where there is a principal who could be charged and the contract is made without disclosing his name. The meaning of this custom is that where the principal's name is not disclosed in or at the time the contract is made, the buyers reserve to themselves the right of suing the broker or factor. I can well conceive that in this trade, and in many others, such a custom is for the broker's benefit, and I am clearly of opinion

that the evidence was properly admitted by the learned judge at the trial. If any remarks of mine in the judgment in *Hutchinson* v. *Tatham* (1) are in conflict with our present decision they must be considered as withdrawn. The appeal must be allowed.

FRY, L.J. I am of the same opinion. If the objection were now being taken for the first time to the admissibility of evidence of a custom to charge the brokers as principals in the event of non-disclosure by them of their principals at the time of the contract, I should have paused before deciding in favour of its admissibility. But that proposition is now clearly established; and we have only to consider whether by the custom of the trade the defendants were liable from the beginning as principals, and whether such a custom contradicts the written contract. I can entertain no doubt on either point. By the terms of the document itself the owner is liable; the custom says the broker shall be liable also; there is nothing in that which is inconsistent with the contract, though it would be inconsistent if the custom were to exclude the liability of the owner.

Appeal allowed.

Solicitors for plaintiffs: *Irvine & Hodges.*
Solicitor for defendants: *Philip Thornton.*

(1) Law Rep. 8 C. P. 482.

W. J. B.

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March 21.

[IN THE COURT OF APPEAL.]

THE BRITISH MUTUAL BANKING COMPANY, LIMITED *v.* THE CHARNWOOD FOREST RAILWAY COMPANY.

Principal and Agent—Representation by Agent for his own Benefit—Liability of Principal.

A principal is not liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends.

The secretary of a company answered questions which were put to him as secretary as to the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own benefit. In an action against the company for loss arising from the representations, the jury found that the secretary was held out by the company as a person to answer such inquiries on their behalf:—

Held (reversing the decision of the Queen's Bench Division) that the company were not liable.

APPEAL from an order of the Queen's Bench Division (Manisty and Mathew, JJ.) directing judgment to be entered for the plaintiffs.

The action was brought to recover damages for fraudulent misrepresentations alleged to have been made by the defendants through their secretary. At the trial before Lord Coleridge, C.J., it appeared that certain customers of the plaintiffs had applied to them for an advance on the security of transfers of debenture stock of the defendant company. The plaintiffs' manager called upon Tremayne, the defendants' secretary, and was informed in effect that the transfers were valid, and that the stock which they purported to transfer existed. The plaintiffs thereupon made the advances. It subsequently appeared that Tremayne, in conjunction with one Maddison, had fraudulently issued certificates for debenture stock in excess of the amount which the company were authorized to issue, and the transfers as to which the plaintiffs inquired related to this over issue. The plaintiffs accordingly lost their security. The defendants did not benefit in any way by the false statements of Tremayne, which were made entirely in the interest of himself and Maddison. There was some question whether Tremayne was still secretary at the time the statements were made, but the jury found that the inquiries were made of him as secretary, and that the defendants held him out as such

to answer such inquiries. The jury assessed the damages, and the Chief Justice left either of the parties to move for judgment. A motion was accordingly made on behalf of the plaintiffs before Manisty and Mathew, JJ., who directed judgment to be entered for them.

The defendants appealed.

1887. Feb. 17. *Finlay, Q.C.*, and *H. Sutton*, for the defendants. The representations made by Tremayne were not made in the interest or on behalf of the company, but he took advantage of his position to make them for his own purposes to enable Maddison to raise money fraudulently. Under these circumstances, and as the company got no benefit, they are not liable. The statement in the judgment in *Barwick* v. *English Joint Stock Bank* (1), of the liability of a principal who has put an agent in his place to do a "class of acts" similar to the one which caused the injury, was not meant to qualify the rule previously laid down that the acts done by the agent must have been done for the benefit of the master. If the act is done by the servant for some purpose of his own, the master will not be liable: *Croft* v. *Alison* (2); *Limpus* v. *London General Omnibus Co.* (3); *Ward* v. *General Omnibus Co.* (4) If an action like the present lies against a corporation, it can only be where the corporation has benefited by the fraud: *Addie* v. *Western Bank of Scotland* (5); *Houldsworth* v. *City of Glasgow Bank.* (6)

W. Graham and *Edward Morten*, for the plaintiffs. Except some dicta in *Addie* v. *Western Bank of Scotland* (5), there is no authority against the proposition that where an agent, acting within the scope of his authority, by a fraud or wrongful act does an injury to any person, the employer is liable. *Swift* v. *Winterbotham* (7) is a direct authority in the plaintiffs' favour. The act itself need not result in a benefit to the master, all that is necessary is that it should be one of the class which the servant is employed to do for the benefit of the master. Willes, J., used the expression "for the benefit of his master" in that sense in *Barwick* v. *English*

(1) Law Rep. 2 Ex. 259.
(2) 4 B. & Ald. 590.
(3) 1 H. & C. 526.
(4) 42 L. J. (C.P.) 265.
(5) Law Rep. 1 H. L., Sc. 145.
(6) 5 App. Cas. 317.
(7) Law Rep. 8 Q. B. 244.

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Joint Stock Bank (1); see also *McGowan* v. *Dyer* (2), where Story on Agency, par. 452, is cited with approval. Where the act might have been one of the class which the servant was employed to do, or might have been outside his employment altogether, the Court will inquire which it really was. *Limpus* v. *London General Omnibus Co.* (3) was one of such cases. Where the act done is admittedly within the scope of the servant's authority, the Court will not go behind that fact, and try and ascertain the intention of the servant.

H. Sutton, in reply.

March 21. LORD ESHER, M.R. In this case an action has been brought by the plaintiffs to recover damages for fraudulent misrepresentation by the defendants, through their secretary, as to the validity of certain debenture stock of the defendant company. The defendants are a corporation, and the alleged misrepresentations were in fact made by a person employed in the capacity of their secretary, and it cannot be doubted that when he made the statements he had a fraudulent mind, and made them knowing them to be false.

I differ from the judgment of the Divisional Court, but I do not think the ground on which my decision is based was present to the minds of the learned judges. The point principally argued in the Divisional Court seems to have been that the defendants could not be liable on account of their being a corporation. It seems to me, however, that there is a defect in the plaintiffs' case irrespective of the question whether the defendants were a corporation or not. The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendants but for himself. He had a friend whom he desired to assist and could assist by making the false statements, and as

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 8 Q. B. 141.
(3) 1 H. & C. 526.

he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms, that to bind the principal the agent must be acting "for the benefit" of the principal. This, in my opinion, is equivalent to saying that he must be acting "for" the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest. The attention of the learned judges seems to have been drawn off from this view of the case by the argument founded on the defendants being a corporation, and I think their judgment must be overruled.

The following judgment was read by

BOWEN, L.J. There is, so far as I am aware, no precedent in English law, unless it be *Swift* v. *Winterbotham* (1), a case that was overruled upon appeal (2), for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of Willes, J., delivered in the case of *Barwick* v. *English Joint Stock Bank.* (3) "The general rule," says Willes, J., "is that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved." This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank.* (4) *Mackay* v. *Commercial Bank of New Brunswick* (5) is consistent with this principle. It is a definition strictly in accordance with the ruling of Martin, B., in *Limpus* v. *London General Omnibus Co.* (6), which was upheld in the Exchequer Chamber (see per Blackburn, J.).

It was argued on behalf of the plaintiffs in the present appeal

(1) Law Rep. 8 Q. B. 244.
(2) *Swift* v. *Jewsbury*, Law Rep. 9 Q. B. 301.
(3) Law Rep. 2 Ex. 259.
(4) 5 App. Cas. 317.
(5) Law Rep. 5 P. C. 394.
(6) 1 H. & C. 526.

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that the defendant company, although they might not have authorized the fraudulent answer given by the secretary, had nevertheless authorized the secretary to do "that class of acts" of which the fraudulent answer, it was said, was one. This is a misapplication to a wholly different case of an expression which in *Barwick* v. *English Joint Stock Bank* (1) was perfectly appropriate with regard to the circumstances there. In that case the act done, though not expressly authorized, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of "that class." Transferred to a case like the present, the expression that the secretary was placed in his office to do acts of "that class" begs the very question at issue, for the defendants' proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do. It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? The action against them, therefore, to be maintainable at all, must be an action of tort founded on deceit and fraud. But how can a company be made liable for a fraudulent answer given by their officer for his own private ends, by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the company be made responsible for an agent's act done beyond the scope of his employment,

(1) Law Rep. 2 Ex. 259.

and from which they derived no benefit? This shews that the proposition that the secretary in the present case was employed to do that "class of acts" is fallacious, and cannot be maintained. The judgment of the Court below is based upon the view that the act done was in fact within the scope of the secretary's employment, and if this proposition cannot be maintained, the judgment must fall with it. How far a statutory corporate body could in any case be made liable in an action for deceit beyond the extent of the benefits they have reaped by the fraud is a matter upon which I desire to express no opinion, for none is necessary to the decision here; but even if the principals in the present case were not a statutory body, with limited powers of contracting and of action, I think there would be danger in departing from the definition of liability laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank* (1), and in extending the responsibility of a principal for the frauds committed by a servant or agent beyond the boundaries hitherto recognised by English law. I think, therefore, that this appeal must be allowed with costs.

FRY, L.J. I agree in the view that the appeal must be allowed. It appears to me that the case is one of an action for fraudulent misrepresentation made by a servant, who in making it was acting not in the interest of his employers, but in his own interest. It is plain that the action cannot succeed on any ground of estoppel, for otherwise the defendants would be estopped from denying that the stock was good. No corporate body can be bound by estoppel to do something beyond their powers. The action cannot be supported, therefore, on that ground. Nor can it be supported on the ground of direct authority to make the statements. Neither can it be supported on the ground that the company either benefited by or accepted or adopted any contract induced or produced by the fraudulent misrepresentation. I can see no ground for maintaining the action, and the appeal must be allowed.

Appeal allowed.

Solicitor for plaintiffs: *J. White.*

Solicitors for defendants: *G. H. K. & G. A. Fisher.*

(1) Law Rep. 2 Ex. 259.

A. M.

1887

April 2, 4, 22.

IN THE MATTER OF

THE DUTY ON THE ESTATE OF THE NEW UNIVERSITY CLUB.

Revenue—Duty on Property of Bodies corporate and unincorporate—Exemption—Property of Club—Entrance Fees and Subscriptions—"Funds voluntarily contributed"—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11 (6).

Exemption was claimed by a members' club, the property of which was vested in trustees, and which had been established less than thirty years, from the duty imposed on the annual value, income, or profits of bodies corporate and unincorporate by s. 11 of the Customs and Inland Revenue Act, 1885, on the ground that the property of the club was "property acquired by or with funds voluntarily contributed" within thirty years preceding, within the meaning of the 6th exemption in that section.

By the rules of the club every member on admission paid an entrance fee and the annual subscription for the current year, and until payment was not admitted to any of the benefits or privileges of the club, and payment was considered as a declaration of submission to the rules; an annual subscription was payable on January 1 in each year, and if it was not paid on or before March 1, the member's name was erased from the list of members, and a member intending to withdraw from the club had to give notice on or before January 1, or otherwise was liable to pay his subscription for the current year:—

Held, that, as the entrance fees and subscriptions were paid by members in consideration of the right to enjoy the benefits and privileges of the club, they were not "funds voluntarily contributed" to the club, and therefore duty was payable on property acquired with money so paid.

Society of Writers to the Signet v. *Commissioners of Inland Revenue* (14 Court of Session Cases, 4th Series, 34) approved.

A WRIT of summons was issued, pursuant to the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 55 (which is applied by s. 19 (1) of the Customs and Inland Revenue Act, 1885, to cases under that Act), directed to the secretary of the New University Club, claiming delivery of an account upon oath of all the real and personal property which belonged to or was vested in the club, or in any trustee or other person on behalf of the club, during the yearly period ending on April 5, 1885, and of the gross annual value, income, or profits of such property which accrued to the club in the same yearly period, and of all deductions claimed in respect thereof, whether as necessary outgoings or under the exemptions allowed by the Act.

The secretary entered an appearance, and filed an affidavit in answer to the writ, and on December 18 and 20, 1886, cause was

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shewn on behalf of the club against rendering the account required by the writ and payment of the duty.

The Court (Huddleston, B., and A. L. Smith, J.) were of opinion that by s. 15 (1) of the Customs and Inland Revenue Act, 1885, an account must be delivered, and the case stood over for that purpose.

An account was accordingly delivered, which, after deducting from the total annual value, income, or profits of the property the annual deductions or out-goings, shewed a net annual value, income, and profits of 266*l.* 15*s.* 10*d.*, in respect of which total exemption from duty was claimed by virtue of the 6th exemption in s. 11 of the Customs and Inland Revenue Act, 1885.

April 2 and 4, 1887; before Hawkins and A. L. Smith, JJ.

Sir Richard Webster, A.G., and *Dicey*, for the Crown.

Charles, Q.C., and *Archibald*, for the New University Club.

The facts and arguments are fully stated, and the clauses in the statute on which the decision turned, and such of the rules of the club as are material, are set out, and the cases cited are referred to and commented on, in the judgments.

Cur. adv. vult.

1886. April 22. The following judgments were read:

HAWKINS, J. The question in this case is whether the property of the New University Club is chargeable with the duty imposed on the property of bodies corporate and unincorporate by the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), part 2. Before the passing of that Act bodies corporate and unincorporate escaped all liability to probate, legacy or succession duties, for this simple reason; they do not die, and so no such duties ever became payable as they do in the case of private individuals dying possessed of property. The 11th section of the Act above referred to, after reciting the existence of this state of the law, declares that it is expedient to impose a duty on the property of such bodies by way of compensation to the revenue, and then proceeds to enact "that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or

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unincorporate during the yearly period ending on April 5, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges and expenses properly incurred in the management of such property;" then follow certain exemptions from such duty in favour of (inter alia) "property of the descriptions following (that is to say); . . . (6.) Property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding."

The New University Club was founded in the year 1864. It is a members' club regulated by certain printed rules.

By r. 16, "Every member on his admission, shall pay an entrance fee of thirty guineas, besides the annual subscription for the current year." By r. 17, "An annual subscription of eight guineas shall be due and payable from each member on the 1st of January in each year."

By r. 18, "No member shall be admitted to any of the benefits or privileges of the club until he shall have paid his entrance money and first annual subscription. As every member will, on such payment, become entitled to the benefits and privileges of the club, so such payment will be considered as a declaration of his submission to the rules and regulations of the club."

By r. 20, "Any member intending to withdraw his name from the club shall give notice in writing to the secretary, on or before the 1st of January, of his intention to do so; or otherwise he shall be liable to pay his subscription for the current year, whether he shall have been in the club-house or not."

By the 22nd and 23rd rules the names of members who have not paid their subscription shall be put up in the two principal club rooms; and if the annual subscription of any member is not paid on or before March 1, his name shall be erased from the list of members.

By r. 25, the funds and property of the club are to be vested in three trustees and their successors.

In the club-house members, subject to certain regulations, are entitled to all the usual privileges of a social London Club—including that of entertaining strangers.

The property of the club consists of the leasehold interest in the house and premises occupied by the club in St. James's Street and Arlington Street, under two leases, dated in 1866 and 1869, and also of furniture, plate, linen, books, &c.

The club-house occupies the site on which in 1864 stood four houses, viz. Nos. 57 and 58, St. James's Street, and Nos. 10 and 11, Arlington Street. In 1864, the club purchased the residue of an existing lease of the St. James's Street houses, subject to a rent of 500*l.*, for the sum of 5500*l.*, all of which was paid out of members' entrance fees and subscriptions.

In 1865 and 1866 the club purchased the residues of two existing leases of the Arlington Street houses, subject to rents amounting in the aggregate to 210*l.*, for sums amounting together to 2920*l.*, which amount was also paid out of entrance fees and subscriptions.

On March 24, 1866, the club agreed with the reversioner of the St. James's Street houses for a fresh lease of that property for a term of 60¼ years from June 24, 1865, at a rent of 700*l.*, the club agreeing to expend 7000*l.* in building a house, &c. on that site. This lease was granted in 1869.

On November 15, 1866, the reversioner of the Arlington Street houses granted a fresh lease of them to the club for sixty-four years from June 24, 1865, at a rent of 500*l.*, the club covenanting to expend 5000*l.* at least in erecting the portion of the club-house now standing on that site.

The result of these transactions was that the club acquired for a long term the site of their present house at rentals amounting to 1200*l.*, with the obligation to expend sums amounting to 12,000*l.* in building upon it. In accordance with their covenant and agreement the club erected the present club-house and premises at a cost of about 26,000*l.*, and such house and premises were completed, and the last payment was made to the builder on 31st December, 1868.

The entrance-fees and subscriptions were not of sufficient amount to pay the cost of building as the works proceeded, and

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accordingly, by a resolution passed at an extraordinary general meeting on July 21, 1865, the committee were empowered to borrow a sum not exceeding 15,000*l.* in order to defray the expenses of building. Under this authority the committee, during the years 1866, 1867, and 1868, issued to members of the club debentures to the aggregate amount of 14,480*l.*; these were to be a charge on the house and other property of the club for payment of the money thereby secured.

During the years 1867 and 1868 the committee issued further similar debentures to the extent of 3095*l.* The aggregate amount of all the debentures so issued was 17,575*l.* They were issued only to members of the club.

The payments made to the builder during the years 1866, 1867, and 1868, amounted to 25,891*l.*, to which must be added a sum of 321*l.* paid to the architect in the year 1869, making the total cost of the building, 26,212*l.*

In addition to the sums raised by the debentures the only available funds of the club were derived from entrance fees and subscriptions; these between the years 1864 and 1868, both inclusive, amounted to 48,798*l.* 7*s.* 3*d.*

The whole of the club moneys, whether derived from entrance fees, subscriptions, or advances on debentures, were paid into one general account at the bankers of the club, and the cheques by which the builder was paid were drawn on that account. It is very certain that sums far in excess of the 7000*l.* and 5000*l.* required to be expended on the St. James's and the Arlington Street sites, were expended on those sites respectively. And whether those amounts were paid out of funds derived from entrance fees and subscriptions, or raised by debentures, it is quite impossible to say from the statements before us. This could only be arrived at (if at all) by a very careful analysis of the banking account, which I think is unnecessary for the purposes of the question we have to determine.

It is, however, beyond doubt that a substantial portion of the money paid to the builder must have come from entrance fees and subscriptions. For the total amount paid to the builder was 25,891*l.*, whereas the aggregate amount of the debentures was but 17,575*l.*, leaving a balance of 8316*l.*, which could only have been paid out of such fees and subscriptions.

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Of the debentures it must be taken as a fact, that the whole of the second issue (3095*l.*), was paid off out of entrance fees and subscriptions between the years 1870 and 1876; and that of the first issue (14,480*l.*), 4970*l.* was paid off in a similar manner before the end of the year 1884, leaving a balance of 9510*l.* of the debenture debt then due.

Upon this state of facts the question arises whether the New University Club has established its claim to exemption from payment of the duty imposed on the property of bodies corporate and unincorporate by the Act of 1885, upon the ground that its club-house and property were "acquired by or with funds voluntarily contributed" to it within the true interpretation of the 6th exemption.

That the club is a "body unincorporate" within the meaning of the Act is clear (1), and it is equally clear that all its property has been acquired within thirty years.

For the Crown it was argued against the exemption, first, that, assuming the club property to have been wholly acquired by means of entrance fees and subscriptions, such fees and subscriptions were not voluntary contributions within the meaning of the 6th exemption; secondly, that, inasmuch as a great portion of the money expended in the acquisition of the property was raised by debentures, to that extent, at least, the property cannot be said to have been so acquired.

It will, I think, be convenient to dispose of the latter contention, before discussing the more universally important question.

If the building and property had been wholly acquired by money raised by debentures, charged, as the debentures in this case were, upon the property so acquired, I should have felt but little difficulty, so long as the debentures remained unpaid, in coming to the conclusion that the property could not be said to be acquired by voluntary contributions. In such case the property would simply have been acquired purely with borrowed money, advanced by the lender upon the security of the property alone, no personal liability being imposed on any member of the club; this appears on the face of the debentures, the form of which is before me.

(1) 48 & 49 Vict. c. 51: see interpretation clause, s. 12.

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The fact that the debentures were only issued to members of the club to my mind makes no difference, for as regards each debenture and the security for the sum represented by it, the member holder of it would have stood in no better or other position than he would have held had he been a mere stranger. The money advanced by him could not by any straining of language have been called a voluntary contribution; it would have been simply money lent, with the intention that it should be repaid with interest, and in the meantime secured so far as the property would afford security. As soon, however, as the debentures were paid off, whether wholly or in part, out of the entrance fees and subscriptions, to the extent to which they were so paid off I think the property would have been acquired by and with such fees and subscriptions. Such is the view I should have taken had the second point been the only one for our consideration.

The first question, however, is, not whether the club-house and property has been acquired by the entrance fees and subscriptions of the members, but whether such fees and subscriptions were voluntary contributions within the meaning of the exemption.

This question is not entirely free from difficulty, and such authorities as there are upon it are not altogether satisfactory.

In the course of the argument we were especially asked to observe that there is a difference between a "gratuitous" act and a "voluntary" one, and that the statute speaks of funds "voluntarily," not "gratuitously," contributed: that it is purely at the option of every man elected a member of a club to take up his membership by paying his entrance fee and subscription, or not, as he pleases; and, therefore, if he does take it up by making such payments, it is a mere voluntary act, and the payment is a mere voluntary payment. I am not prepared to assent to that proposition; true it is no man can be made a member of a club against his will; his consent, therefore, to become a member is purely a voluntary act, but that does not, to my mind, make the payment, which is a condition precedent to his being permitted to avail himself of the privileges of his membership, a voluntary payment, any more than the payment for admission to a theatre could be said to be voluntary. It is purely an act

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of the will to desire to go to a theatre, but the payment for admission is a condition forced upon a person who so desires before his wish can be gratified. What is the substantial difference between the two cases? In the one a man pays the price of a ticket to witness the performance in the theatre; in the other he pays a fixed sum of money as the price of his title to enjoy the luxuries, comforts and conveniences of a club. Suppose a club established, the rules of which required, besides an entrance fee, an annual subscription of 200*l.*, in return for which each member was entitled to a bedroom and his board, in addition to the other amenities of the establishment. Could the money paid as the price of these necessaries and comforts of life be deemed to be mere voluntary payments? I unhesitatingly say no. I confess I am very much disposed to the opinion that on payment of the entrance fee and subscription for the current year, a contract to pay the next annual payment, unless the member withdraws in the meantime, is established; and that thenceforth the member is as much bound by the rules of the club to pay his subscription (see rule 18) as he is entitled to the privileges conferred on him by his membership. The case of *Raggett* v. *Bishop* (1) is an authority for saying that an action will lie for a subscription due from a member of a proprietary club. I would not, however, be understood to lay down as a general rule that a member may be sued for his subscription, for much must depend upon the rules of each particular club, and I am not prepared to say that the entrance fee and first year's subscription could be sued for at all, for an elected member has an option to accept or refuse the membership offered him; but once fully admitted as a member, I see no reason why he should not be bound to fulfil all the obligations imposed upon him by the rules, to which he has given his submission as part of the consideration for the benefits he has acquired a right, so long as he continues a member, to enjoy. Every contract is the result of a voluntary agreement, and yet it is difficult to see how moneys paid under an obligation imposed by such contract can be said to be a voluntary payment.

In the course of the argument my brother Smith put the case

(1) 2 C. & P. 343.

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of a person going into a shop and putting down on the counter half-a-crown for a pair of cheap gloves. In one sense, his putting down the coin and allowing the shopkeeper to take it up may be said to be voluntary acts, because he was not obliged to put his money down or allow the shopkeeper to take it up; but nobody in his senses would speak of them as such, for the payment was made subject to a condition that the gloves should be given in exchange. I know it may be asked for what objects can property be acquired by voluntary contributions, so as to give effect to the 6th exemption, if such associations as clubs are not within it? for property applied to religious and charitable purposes, and for the promotion of literature, education, science and the fine arts, are especially provided for by exemption 3. Without attempting a definition I would say (among other things), property acquired for the mere innocent amusement and recreation, or for promoting the general health and comfort, of the public, from which no special advantage or benefit is sought to be derived by the contributor to the funds raised for its acquisition. For instance, a people's palace, a public recreation ground, public baths and washhouses, or other institutions of a like nature.

All the cases cited to us, except the Scotch case (1), turned upon the interpretation of the words "annual voluntary contributions," used in s. 1 of 6 & 7 Vict. c. 36, which exempted from rates buildings, &c., belonging to any society instituted for the purposes of science, literature, or the fine arts exclusively, "provided that such society shall be supported wholly or in part by annual voluntary contributions."

In the case of *Churchwardens of Birmingham* v. *Shaw* (2) the property sought to be rated was the Birmingham New Library, belonging to a society so called, instituted solely for the purposes of literature, and supported mainly by sums paid on the admission of members and by annual subscriptions, and the advantages of the society were not confined to the admitted members of it. In delivering the judgment of the Court (3) Lord Denman said: "If the contributor was free to commence his contribution, and incurs

(1) *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 14 Court Sess. Cas. 4th Series, 34.

(2) 10 Q. B. 868; Feb. 8, 1849.

(3) Lord Denman, C.J., Patteson, Coleridge, and Wightman, JJ.

no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor, unless we add something to the idea of voluntariness which in ordinary language it does not import." Assuming, as we do, the correctness of that judgment, it is not in my opinion at all decisive of the present case. The expression "voluntary contribution" is not, as I think, one to which a fixed, definite interpretation can be given, applicable to all cases. In each case where this or a similar expression is used in a statute, the object and intention of the legislature must be considered. The statute 6 & 7 Vict. c. 36, was intended to encourage and promote the interests of such literary and scientific societies as were (among other conditions) supported wholly or in part by voluntary contributions. The sums paid on admission of members, and the annual subscriptions, were devoted purely to the support of the library and the necessary expenses of the current year; and it certainly never could have been in the contemplation of the legislature to exclude a purely literary society from the benefit of the exemption merely because those by whose contributions it was supported partook of the advantages the society was intended to afford, and to promote which their own subscriptions were given.

The case of *Russell Institution* v. *Vestry of St. Giles* (1) was decided by the Court (2) against the institution, upon the ground that it was not a "society instituted for the purposes of science, literature, or the fine arts *exclusively*." It was unnecessary therefore to determine whether the funds for its support were raised by "voluntary contributions;" but Lord Campbell, in giving judgment, said: "There may be ground for contending that 'contribution' here does not mean a voluntary annual subscription or payment of money for value received, or expected to be received, by the party paying, but means a gift made from disinterested motives for the benefit of others;" (citing St. Paul's Epistle to the Romans, chap. xv. ver. 26).

In *Churchwardens of St. Anne Westminster* v. *Linnæan Society of*

(1) 3 E. & B. 416; 23 L. J. (M.C.) 65; Jan. 18, 1854.
(2) Lord Campbell, C.J., and Erle, J.

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London (1) it was admitted that the society was instituted for the purposes of science exclusively, but it was contended that it was not supported wholly or in part by annual voluntary contributions. In fact it was supported by admission fees and contributions of its fellows, each of whom entered into an engagement to pay his yearly contribution. Lord Campbell and Erle, J., held that these contributions were voluntary; Lord Campbell, without explaining how his doubt in the *Russell Institution Case* (2) was removed, said: "Though the fellows are under an obligation to pay while they continue fellows, the payment is still voluntary, seeing that the obligation was incurred by a voluntary engagement from which the fellows are at liberty to withdraw"; and he added: "I do not say that even if they had no longer the power to withdraw, the payment would be the less voluntary"; and Erle, J., said: "This subscription is in the nature of a gift for the purpose of science, *nothing being received back for the personal profit of the party paying*; and it is voluntary, inasmuch as a party by withdrawing his name will cease to pay." Without differing from the rest of the Court, Crompton, J., expressed his doubts as to the soundness of the judgment on the point under discussion.

In *Vestrymen of Marylebone* v. *Zoological Society of London* (3) the society was partly supported by annual contributions. Whether they could be treated as voluntary or not it did not become necessary to pronounce a judgment, because the Court was of opinion that the objects of the society were not exclusively scientific. It did nevertheless express an opinion that the subscriptions were not voluntary contributions, on the ground, as Erle, J., put it, that "*contributions are not so where the intention is to purchase a private convenience*," as in the case before them.

This is a strong authority in support of the view I have taken of the case before us.

In the case of *Bradford Library and Literary Society* v. *Churchwardens of Bradford* (4), the society, which was exclusively devoted to literature, was supported partly from the purchase-

(1) 3 E. & B. 793; 23 L. J. (M.C.) 148; May 31, 1854; Lord Campbell, C.J., Erle, and Crompton, JJ.

(2) 3 E. & B. 416; 23 L. J. (M.C.) 65.

(3) 3 E. & B. 807; 23 L. J. (M.C.) 139; also May 31, 1854. Lord Campbell, C.J., Erle, and Crompton, JJ.

(4) 1 E. & E. 88; 28 L. J. (M.C.) 73; Nov. 13, 1858. Lord Campbell, C.J., and Erle, J.

money of shares in it, partly from the annual subscriptions of members, required to be paid by a rule of the society, and partly from other sources, and each subscriber signed a deed binding himself to obey the rules. It was urged against the society that, inasmuch as the subscribers were bound by the deed to pay their subscriptions, they could not be treated as voluntary contributions; but Lord Campbell met that argument by the observation that a contribution paid under an obligation voluntarily incurred was a voluntary contribution, and that there was nothing to shew that pecuniary benefit was contemplated by the shareholders, citing with approbation the cases of the *Linnæan Society* (1) and the *Birmingham Library* (2), and Erle, J., expressed a similar opinion, and substantially repeated that which he had said in the *Zoological Society Case.* (3)

Liverpool Library v. *Mayor, &c., of Liverpool* (4) need only be referred to for the opinion of Pollock, C.B., that the annual subscriptions were voluntary because the society could not enforce payment, or, as Martin, B., put it, they were continued purely at the will and pleasure of the subscribers.

These are all the English cases which were cited to us during the argument.

The only other authority to which I propose to refer is the case of *Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (5), which was decided by the Court of Session, formed by Lord Inglis the Lord President, and Lords Mure, Shand, and Adam, on November 3 last. It involved, among others, the very question we are called upon to determine under the sixth head of exemptions from the duty imposed by s. 11 of the Customs and Inland Revenue Act, 1885. In delivering his opinion the Lord President said: "I think the meaning of the statute undoubtedly is, that if money be given, presented to the society in any form, without consideration, by any body, any property purchased with that money, if it be given within a certain period, shall be exempt from liability. But the moneys which are here paid by

(1) 3 E. & B. 793; 23 L. J. (M.C.) 148.

(2) 10 Q. B. 868.

(3) 3 E. & B. 807; 23 L. J. (M.C.) 139.

(4) 5 H. & N. 526; 29 L. J. (M.C.) 221; April 23, 1860.

(5) 14 Court Sess. Cas. 4th Series, 34.

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apprentices and entrants to the Society of Writers to the Signet are not given in that sense. They are given as the price of admission to the privileges of the society. They are given, therefore, under a contract and nothing else. . . . In these circumstances, I cannot hold that there is anything voluntary in the case." This opinion was concurred in by the rest of the Court, and the claim for exemption was disallowed. This case is in point in support of the view I had entertained before reading it, and which I have above expressed.

The result is that in my judgment the New University Club is not entitled to the exemption claimed.

There must, therefore, be judgment for the Crown, with costs.

A. L. SMITH, J. The question in this case is whether the New University Club in St. James's Street is liable to pay the duty imposed by the Customs and Inland Revenue Act, 1885, (48 & 49 Vict. c. 51), or is exempt therefrom.

The New University Club is a West End club, consisting of members of the two Universities, and has trustees and a committee of management, as in such clubs ordinarily is the case.

The club is supported and maintained by means of entrance fees paid by its members upon election and of the subscriptions paid by them annually upon and after election.

The point taken on behalf of the club is that these entrance fees and annual subscriptions are "funds voluntarily contributed," within the true intent and meaning of s. 11, sub-s. 6 of the above mentioned Act.

The 11th section, upon which this question turns, so far as is material, is as follows: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue; Be it therefore enacted, that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to, or been vested in, any body corporate or unincorporate during the yearly period ending on the 5th day of April, 1885, or during any subsequent yearly period ending on the same day in any

year, a duty at the rate of 5*l.* per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property. Subject to exemption from such duty in favour of property of the descriptions following (that is to say)" (inter alia):—

"(3.) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

"(6.) Property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding."

By s. 12 the term "body unincorporate" includes every unincorporated company, fellowship, society, and association.

It must be patent to anyone who reads this statute, and indeed in my judgment it is common knowledge, that the object which the legislature had in view when it passed this Act was that institutions such as West End clubs (together with other kindred associations) should not thereafter be free from the death duties, or their equivalent, which theretofore had been the case, and that it was for this express purpose that the statute was passed.

It is said, however, that it has missed the mark, and that club property acquired by means of entrance fees and annual subscriptions is "property acquired by funds voluntarily contributed," and that if such subscriptions were paid within the period of thirty years from the date of taxing, the clubs receiving such subscriptions were exempt as to such from the tax imposed by the statute.

This was the proposition, which certainly is novel, but such it was.

It was said that the word "*payment*" was synonymous with contribution, and that the word "voluntary" did not mean gratuitous, but meant given without compulsion, and that, therefore, no matter for what purpose and to what object the payment

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was made, if made without compulsion it was a voluntary contribution within the meaning of the Act.

Apart from the authorities with which we were pressed by Mr. Charles and Mr. Archibald, I should have thought the point unarguable. It seems to me that the "funds voluntarily contributed," pointed at in the 6th sub-section of s. 11, are funds contributed by means of donations, legacies, gifts, and such like; and certainly do not embrace entrance fees and annual subscriptions to a club, which are payments of money for value received or to be received, and are not what I should call voluntary contributions at all.

In my judgment what is or is not a voluntary contribution must in each case depend upon the object for which and the object to which the contribution is made. In each case, as it seems to me, it must be a question of fact.

To explain what I mean I will give an example. To pay 1*l.* to a benefit match of a professional cricketer for his own pocket would, I should say, be a voluntary contribution. To pay 1*l.* to get access and right to a special seat upon the ground for the match I should myself not call a voluntary contribution at all. It is a payment for value received or to be received, and not a contribution at all. In the one case you give, you voluntarily contribute, in the other case you pay for what you receive.

These two example cases are clearly distinct and dissimilar. This, as it seems to me, must be admitted, but if not admitted I hold them to be so. If, then, the one is a voluntary contribution, which I think is manifest, what is the other? There is only one answer, viz., that it is not. It may be said that each is a voluntary act of the payer, and so it is, for he was under no compulsion to do either; no more, I answer, is a man under compulsion who purchases what his desire dictates, but that certainly does not, in my judgment, make the payment for the article purchased a voluntary contribution.

But it is argued that the cases have decided otherwise, and that I am bound to hold that these entrance fees and subscriptions are funds voluntarily contributed within the Act.

I decline altogether to attempt to give an exhaustive definition of what are or are not funds voluntarily contributed, for if I did I

should, as it appears to me, land myself in the same difficulties which the learned judges who decided the cases in question, as it appears to me, got themselves into.

The cases referred to are all cases upon the construction of 6 & 7 Vict. c. 36, which exempted from rates "any society instituted for the purposes of science, literature, or the fine arts exclusively . . . provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division or bonus in money unto or between any of its members."

It should be pointed out that in every one of the cases cited the Court was dealing with societies alleged to be instituted for the purposes of science and art, and wholly or partly supported by voluntary contributions; and it seems to me that the learned judges, in interpreting what voluntary contributions in the statute then in question meant, necessarily and in fact did interpret that statute in combination with its object, or, in other words, took into account, in interpreting "voluntary contributions" therein, the object to which, and the object for which, the contribution or payment was in fact in each case made.

In the first case, viz., that of *Churchwardens of Birmingham* v. *Shaw* (1), in 1849, Lord Denman, in delivering the judgment of the Court of Queen's Bench, undoubtedly held that the words "annual voluntary contributions" in 6 & 7 Vict. c. 36, were satisfied if the contributions commenced of the party's own choice, were so continued, and might be withdrawn at pleasure, that is, without subjecting the party to any legal liability.

I think that Mr. Charles was right also when he said that in the judgment upon that statute it was held that the test of a payment being voluntary or not was not whether personal benefit was derived by the payer, but whether it was a payment which the payer might commence, continue, and withdraw at his own will and pleasure. I agree with the statement of Mr. Charles upon this case. I must, however, point out that Lord Denman at the commencement of the judgment upon this point begins by this statement: "It is perhaps not easy to determine what the legislature intended by the word 'voluntary' in this combination" (2),

(1) 10 Q. B. 868.

(2) 10 Q. B. at p. 875.

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and after giving the definition which he considered on that statute would satisfy the condition therein, ended by stating that in the statute voluntary contribution does not mean gratuitous, and bringing no return of any kind to the contributor, because, for one reason at any rate, the statute itself excluded the notion of its (i.e. return to the contributor) being implied.

It appears to me that this case is not conclusive at all upon the true construction of sub-s. 6 of s. 11 of the Act now in question.

Five years later, viz. in 1854, three cases came up for decision upon the same statute, viz. 6 & 7 Vict. c. 36.

The first was the case of *Russell Institution* v. *Vestry of St. Giles.* (1)

In that case the Court held that the Russell Institution, which comprised a library, theatre, lecture-room and news-room, was, although a certificate under the Act had been given that it was entitled to the benefit of the Act, not so entitled.

Lord Campbell, in delivering the considered judgment of the Court, stated as follows: "It is unnecessary to decide whether this be a society supported in part by annual voluntary *contributions* within the meaning of the Act. There may be ground for contending that *contribution* here does not mean a voluntary annual subscription or payment of money for value received, or expected to be received, by the party paying, but means a gift made from disinterested motives for the benefit of others." (2) It should be noticed that the case of *Churchwardens of Birmingham* v. *Shaw* (3) was before Lord Campbell when he delivered this considered judgment of the Court of Queen's Bench in the year 1854, and it seems to me that Lord Campbell may well have made the remarks he did, not acquiescing altogether in the ratio decidendi of the Court of Queen's Bench in the *Birmingham Case.* (3)

Later on in the same year, viz. May 31, 1854, two other cases upon the same statute came up for determination. The first in the books is that of *Churchwardens of St. Anne Westminster* v. *Linnæan Society of London.* (4) In that case the Court held that

(1) 3 E. & B. 416.
(2) 3 E. & B. at pp. 427, 428.
(3) 10 Q. B. 868.
(4) 3 E. & B. 793.

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the object of the society was exclusively that of science. Lord Campbell in delivering his judgment stated that as regards the *Russell Institution Case* (1), where newspapers were supplied and accommodation given to the subscribers, this prevented the payments from being mere voluntary contributions for the promotion of science. (2) Why? I ask. Because, as it seems to me, as before stated, the object to which, and the object for which, the contribution was made had to be looked at. Erle, J., in the same case, says: "It is suggested that the payments are not voluntary because every fellow becomes liable to the payment. But this subscription is in the nature of a gift for the purposes of science, nothing being received back for the personal profit of the party paying." I read here "profit" as equivalent to "benefit." I will ask, is the entrance fee or annual subscription to the New University Club in the nature of a gift at all, or is nothing received back for the personal benefit of the party paying?

Crompton, J., doubted whether the contributions in that case were voluntary at all.

The next case, decided upon the same day and by the same Court, was that of *Vestry of the Parish of Marylebone* v. *Zoological Society*. (3) Lord Campbell in that case observed: "If I were called upon to decide the point I should say that the contributions were not voluntary." These were payments made by fellows to entitle them to entrance and the advantages of the gardens.

Erle, J., says: "As to the question whether the contributions are voluntary, we have expressed an opinion that contributions are not so where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects." Unless the objects for which and the objects to which the payments are made are in each case to be inquired into, I do not understand these two judgments, upon the same day and by the same judges, in the one case they expressing an opinion that the payments were voluntary contributions, and in the other not.

In 1858 the case of *Bradford Library and Literary Society* v.

(1) 3 E. & B. 416. (2) 3 E. & B. at pp. 804, 805.
(3) 3 E. & B. 807.

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Overseers of Bradford (1) was decided. The Court (Lord Campbell and Erle, J.), held that the society was exclusively for purposes of literature, and that the subscriptions paid thereto were, as it seems to me, consequently, voluntary contributions within 6 & 7 Vict. c. 36, and were similar to the contributions in the case of *Churchwardens of Birmingham* v. *Shaw*. (2)

In 1860, in *Liverpool Library* v. *Mayor, &c., of Liverpool* (3), the Court held that the library was within the exception of 6 & 7 Vict. c. 36, and that the payments thereto were voluntary, the Lord Chief Baron holding that they were voluntary because payment could not be enforced, Baron Martin because the payment was continued purely at the will and pleasure of the subscriber, Barons Bramwell and Wilde giving no reasons why they held them to be voluntary contributions.

What then do I find the result of the six cases upon the 6 & 7 Vict. c. 36, to be?

I find in four of them, viz., the *Birmingham Case* (2), the *Linnæan Society Case* (4), the *Bradford Library Case* (1), and the *Liverpool Library Case* (3), the Court holding that the societies were in each of the cases instituted for the purposes of science, literature, or the fine arts exclusively, and that the subscriptions thereto were voluntary contributions. I find in the other two, viz., the *Russell Institution Case* (5) and the *Zoological Society Case* (6), the Court holding that these societies were not for the purposes exclusively excepted by the Act of 6 & 7 Vict. c. 36, and giving strong indication of opinion that the subscriptions thereto were not voluntary contributions. Why is this, and how is it to be explained? It seems to me only upon the supposition that the learned judges who decided these cases did look at the objects for which and to which the respective payments were made, and this is, in my judgment, the sole way of determining in each case as it comes up whether a subscription be or be not a voluntary contribution.

I do not find myself, therefore, bound by English authority.

The Attorney General referred to a Scotch case, *Society of*

(1) 1 E. & E. 88.
(2) 10 Q. B. 868.
(3) 5 H. & N. 526.
(4) 3 E. & B. 793.
(5) 3 E. & B. 416.
(6) 3 E. & B. 807.

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Writers to the Signet v. *Commissioners of Inland Revenue* (1), decided upon the statute we are now inquiring into, by Lords Inglis, Mure, Shand, and Adam, who held, as I hold, that club fees and subscriptions are not "funds voluntarily contributed" within the meaning of the Act.

In the result of that case I entirely concur. Mr. Charles says it is wrong. I differ with him, and holding, as I do, a clear opinion that these fees and subscriptions of the New University Club are not voluntary contributions within the meaning of the 48 & 49 Vict. c. 51, I give judgment for the Crown accordingly.

Two other points were taken; viz., it was asserted by the Crown that some of the funds were contributed to the club by means of money raised upon debentures, and also that as to the annual subscriptions, by the rules of the club, to which the members submitted themselves, they could be sued therefor, in the event of their not having sent in their resignations prior to January 1 in any year.

It is unnecessary to decide either point, but the inclination of my opinion upon both points is in favour of the Crown, though I desire not to express any definite judgment upon either.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for the New University Club: *Tucker & Lake.*

(1) 14 Court Sess. Cas. 4th Series, 34.

P. B. H.

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April 20, 21.

[IN THE COURT OF APPEAL.]

THE NORTH AND SOUTH WESTERN JUNCTION RAILWAY COMPANY, APPELLANTS; THE ASSESSMENT COMMITTEE OF THE BRENTFORD UNION AND THE OVERSEERS OF THE PARISH OF ACTON, RESPONDENTS.

Poor-rate—Rateable Value—Line leased by Railway Company, Mode of assessing—Leased Line when not to be treated as integral Part of leasing Company's System, but as independent Line.

A railway company constructed under the powers of their Act a line which formed a connecting link between the lines of three other companies, and for some time retained possession of such line, taking tolls for the use of it by such other companies. Subsequently, by an agreement between the first-mentioned company, therein called "the lessors," and the three other companies, therein called "the lessees," which agreement was confirmed by and was to have the same effect as if its provisions had been enacted in an Act of Parliament, the line was leased to the lessees in perpetuity at an annual rent, and the lessees were by such Act empowered to use, and they did use, such line in connection with their respective systems without payment of tolls. The existence of the said first-mentioned company was continued by the confirming Act for certain purposes, such as the receipt of the yearly rent and its distribution among the shareholders, and there was a provision in the agreement which by necessary implication gave power to the lessees to let the line with the consent of the lessors under seal:—

Held, reversing the decision of the Queen's Bench Division, that, having regard to the provisions of the agreement and of the Act confirming it, the rateable value of the line for the purposes of the poor-rate was not to be ascertained as if it were an integral portion of the lines of the three companies using it, but was to be based upon the rent which a tenant from year to year might reasonably be expected to give for it as an independent line.

AN appeal to quarter sessions against a poor-rate having been referred to arbitration by consent of the parties, the arbitrator, pursuant to a power contained in the order of reference, stated his award in the form of a special case for the opinion of the Queen's Bench Division, the material parts of which are as follows:

1 and 2. The appeal is against a poor-rate made for the parish of Acton, in which the appellants' railway, land, station, buildings, railway appurtenances, and coal-yard were rated at 3125*l.* gross estimated rental and 2500*l.* rateable value. The total length of the appellants' railway is 5 miles 11 chains, 3 miles 7 chains of which are in the parish of Acton.

3. The appellants' railway was constructed by the North and South Western Junction Railway Company (hereinafter referred to as "the Junction Company"), under the powers of the North and South Western Junction Railway Act, 1851, and was opened for traffic in the year 1853.

4. The appellants' railway forms a connecting link between the London and South Western Railway and the Great Western Railway, the Midland Railway, and the London and North Western Railway, which latter railway is in connection with the North London Railway.

5. Up to the year 1871 the Junction Company were in possession of the railway, and under the powers of the said Act and certain agreements took tolls for the use of it by the various companies whose traffic passed over it, but they did not themselves provide any rolling stock or carry any traffic over the line.

6. In the year 1871 an agreement was entered into between the Junction Company and the London and North Western Railway Company, the Midland Railway Company, and the North London Railway Company (hereinafter referred to as "the three companies"), whereby it was agreed that the Junction Company should lease their undertaking in perpetuity to the three companies at an annual rent of 9502*l*. This agreement was confirmed by the North and South Western Junction Railway Act, 1871 (34 & 35 Vict. c. cxcii.), and is set out in the schedule to that Act.

By s. 3 of the Act the agreement was confirmed and was to be carried into full effect as between the parties thereto as fully as if the provisions thereof were set forth and enacted in the body of the Act.

By s. 6 it was provided that the lease should not take away, abridge, or otherwise affect any of the duties, obligations, restrictions, or liabilities to which the Junction Company would or might have been by law subject if the lease had not been made; and all bodies and persons, other than the lessees, should have the same rights, privileges, powers, and remedies against the Junction Company after and notwithstanding the making of the lease as they would or might have had if the lease had not been made.

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It was provided by the agreement, among other things, that the lease should comprise the powers and rights vested in the lessors under their Acts, but should not comprise surplus lands belonging to them, which were to be dealt with as if the lease had not been made, except that certain rights of pre-emption were given to the lessees; that the rent under the lease might, if not paid, be recovered by the lessors by action or by distress on the goods of the lessees on the demised premises; that the lessees were to have the exclusive right of conducting, managing, regulating and carrying on the traffic of the demised undertaking, and of fixing the tolls, rates, fares, and charges in respect of traffic thereon of all companies and persons other than the lessees; and that the lessors were from time to time, on the application of the lessees, to duly make and publish all proper by-laws and notices of tolls, rates, fares, and charges to be taken in respect of the undertaking. The 33rd article of the agreement provided that the lessees should not assign, let, or part with the demised undertaking or any part thereof or the interest of any of them therein without the previous consent under seal of the lessors.

It was enacted by the confirming Act that the Junction Company should hold the rent under the lease on trust to apply the same as the net income arising from their undertaking if they were in possession thereof would be applicable, and provision was made for the appointment of a joint committee of the three companies for the management of the line, and power given to each of the three companies to use the railway without payment of toll.

8. [After setting out the mode of working the traffic over the junction line, the paragraph states:—] None of the companies pays tolls for the use of the junction line. Each of the three companies charges through fares or rates for the traffic passing over its own line and the line of the Junction Company. The sums received by the joint committee in respect of local traffic are applied towards the maintenance of the line and stations and other joint expenses, the full amount of which they are insufficient to pay, and the deficit and the rent are paid in equal proportions by the three companies.

9. Since the passing of the Act confirming the lease the joint committee on behalf of the three companies have been in possession of the line of railway, stations, and buildings, and have appointed the officers and servants in charge of them, and the Junction Company has continued to exist only for the purpose of receiving the rent and distributing it amongst the shareholders.

10. It was contended on behalf of the respondents that the Junction Company were to be considered for rating purposes as the occupiers of the line and ought to be rated, and that the rateable value should be based upon the rental paid under the agreement. If this contention were correct, it would give a rateable value in excess of that appealed against.

11. The arbitrator was to be at liberty to make any amendments in the rate, notice, and grounds of appeal, and descriptions of parties rated and appealing.

12. The arbitrator was of opinion that the three companies were occupying the line by the joint committee. If the Court thought that this view was wrong, and that for rating purposes the Junction Company ought to be considered the occupiers of the line and rated, then the appeal was to be dismissed. . . . If the Court were of opinion that the view that the three companies were the occupiers and ought to be rated was right, then the rate and the notice and grounds of appeal were to be amended by substituting the three companies for the Junction Company.

13. It was contended on behalf of the appellants that, under the circumstances hereinbefore stated, the appellants' railway is worked as part of the system of each of the three companies, and that the arbitrator ought to consider the existing mode of using and working the line, and not what might possibly or even probably be earned by occupying or using the line as a toll-taking line, or as a line used otherwise than in the manner in which it is now used and worked, and that in ascertaining the rateable value of the line of railway the line ought to be treated as an integral portion of the lines of each of the three companies, and therefore that the gross receipts ought to be ascertained by allocating to the line in Acton parish a mileage proportion of the rates or fares actually received by the three companies or the

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joint committee for the whole journey in respect of traffic passing over the whole or any portion of the line in the parish, and the rateable value by deducting from the gross receipts so ascertained the usual allowances for working expenses, interest, and trade profits, rental of stations separately rated, rates and taxes, and the statutable deductions for the maintenance and renewal of the line.

14. It was contended on behalf of the respondents, first, that the arbitrator had to determine what the hereditament would produce if let to a tenant from year to year (making the proper allowances and deductions), and that, as elements to arrive at what that would amount to, he ought to take into consideration (1) the situation of the junction line, as being a line which (it was argued) would command, if in the market and not the property of the three companies now jointly using it, an enhanced price by reason of its position as a connecting link; (2) the probability that one of the three companies would be ready to pay a higher rent than could actually be earned on the line in order to prevent loss which might arise from its falling into the hands of either of the other two companies; and (3) the actual rent paid under the statutory agreement, and treat that as the rent which a hypothetical tenant would give, except so far as the facts proved might be considered by him to shew that during the year in question a hypothetical tenant would not have given as much as the rent reserved by the agreement.

15. The respondents contended, secondly, that the Junction Line should be treated for rating purposes as if in the hands of a company independent of the three companies, and as if it was used as it was formerly used by the Junction Company, tolls being charged in respect of the traffic of other companies passing over it.

16. The respondents contended, thirdly, that the rent the companies paid was primâ facie (after making the statutory deductions and allowances) the rateable value, because there was no evidence to shew that the three companies would not be willing to enter into the same agreement now as that which they entered into in 1871, or that there was no proof that the rent they paid was in fact more than a hypothetical tenant might

reasonably be expected to pay, or at any rate, that the difference was so large as to affect the amount of the rate as laid.

17. The respondents contended, fourthly, that there was no principle of law requiring that the line should be treated as an integral portion of the lines of each of the three companies, or be rated upon a mileage proportion of the rates and fares.

18. The arbitrator was not satisfied that, if the line was occupied by an independent company, or by one of the three companies whose lines of railway are connected with it, such company would have power to divert traffic from one system to another, or would derive any benefit from the occupation of the line except the receipts for the traffic passing over it, and he consequently saw no reason to suppose that, if the railway was in the market, there would be any such competition between those desiring to acquire it as would induce them to give from year to year a higher rental than the net receipts they might expect to derive from the occupation.

19. There was no evidence that the three companies charged exceptional or unreasonably low rates for the traffic which passed over the line, or that they conducted the traffic in an unreasonable or imprudent manner.

20. The traffic passing over the line is considerably in excess of that which was passing over it prior to the lease of 1871, and, if the line were now in the hands of an independent company which charged the same rate of tolls as was received by the Junction Company prior to the year 1870 and if the same amount of traffic continued to pass over the line as is now passing over it, the net receipts would be largely in excess of those calculated on the bases contended for by the appellants, and would justify a higher estimate of the rateable value than that appealed against.

21. The arbitrator stated that no evidence was given before him to enable him to form any opinion as to whether, if the old system of tolls was resorted to, the same amount of traffic would continue to pass over the line as is now passing over it. He stated that, if, in the absence of evidence on the point, he was justified in drawing an inference one way or another, he should infer that it would not, though he would infer that somewhat more would pass over it than did in 1870.

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22. The receipts by the Junction Company prior to and including 1870 were proved, and the arbitrator stated that, if from those and from the increase of the traffic and from the perpetual rent which the companies thought it worth their while to give, he was entitled to speculate as to what an independent company could now earn by occupying the line as it was occupied by the Junction Company and charging tolls for the passage of traffic over it, he believed they would earn receipts which would justify a rateable value equal to that appealed against. He stated, however, that such an inference was necessarily to a considerable extent a matter of speculation because he had no means of forming an opinion as to the extent to which the amount of traffic would be affected by the scale of charges to passengers or consignees of goods or to the railway companies for the use of the line being altered, or as to the motives which induced the three companies to give the perpetual rent, but that it was not altogether speculation, because he found that during the five years, 1866 to 1870 inclusive, the traffic was fairly uniform and the average net receipts of the Junction Company in the parish of Acton was 4636*l.* a year, whereas the appellants now allege that the net receipts in the parish are 3949*l.* a year, from which they claim to deduct for interest on tenants' capital, trade profits, and risks, and casualties a sum reducing the rateable value to 692*l.*

23. If the Court should be of opinion that the appellants' contention was correct, the appeal was to be allowed, and the gross and net rateable value appealed against reduced to 3125*l.* and 1500*l.* respectively.

25. If not, and if the Court should be of opinion that the arbitrator was justified in drawing the inferences of fact stated in paragraph 22 of the case, then the appeal was to be dismissed.

26. The arbitrator was of opinion that the third contention of the respondents, namely, that the rent paid by the three companies under the agreement was (after making the statutory deductions and allowances) primâ facie the rateable value of the line, was not correct, because, although called a rent, it was in fact the consideration agreed to be paid for the acquisition of the line in perpetuity.

27. If the Court should be of opinion that the third conten-

tion of the respondents was correct, the appeal was to be dismissed.

March 1. *Meadows White, Q.C.* (*Tyrrell T. Paine*, with him), for the appellants. The arbitrator is right in finding that the three companies are the occupiers of the line by the joint committee. If they are properly treated as occupiers, then this portion of line is entitled to the benefit arising from its being treated as an integral portion of each of their systems. The rent paid under the agreement is not that which a hypothetical tenant would give for the line; it is a rent-charge paid in consideration of the acquisition of the right to use the line in perpetuity, and is therefore not a conclusive test of rateable value.

McIntyre, Q.C. (*Cyril Dodd*, with him), for the respondents. The Junction Company are still the occupiers of the line, and the rent received by them is the basis of rateable value. The respondents' fourth contention is correct, and there is no principle of law which requires this railway to be treated as an integral portion of the lines of the three companies, and the receipts and allowances to be allocated in that ratio.

Meadows White, Q.C., in reply, was stopped by the Court.

[They cited *Reg.* v. *Sherford* (1); *Reg.* v. *Rhymney Ry. Co.* (2); *Altrincham Union* v. *Cheshire Lines Committee* (3); *West Bromwich School Board* v. *West Bromwich Overseers.* (4)]

DAY, J. I am clearly of opinion that the joint committee or the three companies must be deemed to be the persons in occupation of this piece of railway, and that they are the persons properly rateable, and that the North and South Junction Railway Company are not to be deemed to be in occupation, are not in occupation, and ought not to be rated in respect of this piece of land.

I think that sect. 6, upon which reliance has been placed on behalf of the respondents, does not really affect this question. In my judgment, it merely amounts to a general reservation of rights which is introduced, and properly so, for the purpose of

(1) Law Rep. 2 Q. B. 503.
(2) Law Rep. 4 Q. B. 276.
(3) 15 Q. B. D. 597.
(4) 13 Q. B. D. 929.

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protecting the public in any rights which they had, or might have, under the Act of Parliament against the North and South Junction Railway Company; but it does not, in my opinion, preserve to this parish, or to any other parish, any right of rating the Junction Railway Company after they ceased to be occupiers of the land. There was at the time of the passing of this Act a right to assess the occupiers of this land, and that right is retained; but the Act does not profess to say by s. 6, or by any other section, that this company, which virtually ceased to be in occupation of the land by reason of carrying out this arrangement, shall be for any technical or local purpose still deemed to be in occupation. Their occupation, in my judgment, ceases when the arrangements provided by the Act of Parliament are carried out.

The next question is as to the principle of rating; and I cannot bring myself to entertain the slightest doubt that the true principle to be applied here is the same as is applied to the rating of railway companies generally. This railway has become, by reason of this arrangement, sanctioned by Act of Parliament and carried into effect under the provisions of the Act of Parliament, a portion of the property of the three companies. It is worked by the three companies—by each for its own ends, by each for its own benefit, by each as part of its own system—and the joint committee exists merely for the purpose of preserving to each the full exercise of the rights reserved to each; at the same time preserving harmony between them, and so securing to each the most ample enjoyment of the rights provided by the arrangement. In this view of the case, the rating must be based upon what a hypothetical tenant would give for the property year by year as part of this system, to be worked under this agreement. That is to say, it must be dealt with as an integral part of the three systems of railway. It is idle to suggest that it should be dealt with with reference to what at one time it had been. That has nothing to do with ascertaining the value. The value is what can now be got out of it under the provisions of this Act of Parliament; and the proper question for determination is, what would a hypothetical tenant give for the use of this railway, it being a railway to be used in the way provided by the

Act of Parliament, that is to say, worked by these three lines, each line for its own benefit, at the same time with a reservation of similar rights to the two other companies.

Now, in that view of the case, a hypothetical tenant would take this land just as he takes the land lying within any parish of any single railway, and it is to be dealt with on the same principle as that on which the value of any portion of line running through any parish in the system of the North Western, or the system of the Great Western, or the system of any other railway company, is assessed. The piece of line running through the parish is dealt with not as an independent railway which is supposed to be let to a hypothetical tenant just for the length and breadth of the land occupied in the particular parish, but as part of the whole system; and it is a wrong principle to cut off, as it were, a couple of miles of an extensive system of railway running, perhaps, 200 or 300 miles, and deal with that land as though it were let to a hypothetical or parochial tenant who would take it with the idea of getting all the money he possibly could out of it by taking tolls from the company which must necessarily run over it. That is not the way in which it should be dealt with. It is used as part of the whole system, and the question is what would a hypothetical tenant give for the line considered as part of the system. This piece of land being part of the systems of these three companies, so far as I understand the findings of the arbitrator, must be dealt with accordingly; and in that view of the case it appears to me that the appeal must be allowed.

WILLS, J. I am of the same opinion. I entertained at one time some doubt whether the provision in s. 6 was not intended to preserve the individuality of the Junction Company, although, in my opinion, it would make no difference as to the principle upon which the rating ought to be made or the figures which ought to be arrived at. But I think that that can hardly be so. It is a very general clause reserving all rights and providing that other persons who have rights and claims, whether of a public or private nature, shall not stand in a worse position because the Junction Company's rights have been parted with under this

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agreement. Now, one of the rights which the parish had was to rate the Junction Company, if the occupier of the railway, and to rate whoever might be the occupier. I cannot think that the general words which are used in s. 6 were intended to alter the general law of rating, or to make the Junction Company rateable although they have parted with the occupation. That they have parted with the occupation under the lease seems to me too clear for argument or discussion. Therefore, I come to the conclusion, notwithstanding this large saving in s. 6, that there was no intention to alter the law of rating or to make the Junction Company rateable instead of the persons in actual occupation.

Then the next question is upon what principle are the joint committee to be rated? All the various questions which have been elaborately argued are substantially answered by the answer to one question. It seems to me clear, when you come to consider this agreement, which has now received the sanction of an Act of Parliament, and is part of the law of the land, that Parliament, for good reason, no doubt, has enacted that this little bit of line shall no longer be an independent line, or worked as an independent line, but that it shall be amalgamated with and shall form part of the respective systems of these three lines. Of course the necessary effect of that would be that it would be treated as any other portion of a longer line would be—it would be worked and the tolls would be taken and the charges would be arranged with reference to the general interests of the railway company, and to the convenience of the traffic all over the system. There is no other way in which the business of railway companies can be carried on. The arbitrator finds that, in substance, the business of the railway companies has been "bonâ fide" carried on in this respect and that there has been no intention to starve this particular part of the line, but simply to work it, treating it as an integral portion of their respective systems. I cannot doubt that that is the effect of what Parliament has sanctioned. If so, it seems to me that the general principle as to the rating of railway companies applies; and you can no more treat this little bit of line exceptionally than you can any other portion of the system of one of the great railway companies which is so far in their occupation as to render them rateable in respect of it. It is part

of the general system, and it takes its share of the good and bad fortunes of the general system. It seems to me, therefore, that it must be rated as part of the general system of each of the three lines, and with reference to the advantages and disadvantages to which it is subjected by reason of that arrangement. It seems to be conceded, if it is treated in that point of view, that the appellants are right in their figures. But it is said that the rent which is fixed in perpetuity by this agreement is evidence which ought to be acted upon in fixing the amount; and that is one of the questions which the arbitrator puts to us. I agree with the arbitrator that as soon as you once ascertain that the rent is not a fair representative of the actual earnings of the line under the existing state of things, it ceases to be a test; and if one had known nothing else than that it was a piece of line which was earning 9000*l.* a year, it is possible that that sum spread over the whole line might fairly be taken as a test of the rateable value; but, as the arbitrator has pointed out, a portion of that, undoubtedly, represents the right of using the line in perpetuity with advantage to the companies and making it a part of their system and of running their trains, without paying any higher rate of remuneration, for all time. It is impossible to cut out from the figure which represents two separate elements of that sort a portion, and say that that represents the value of the purchase of these several advantages, and that the rest of it represents the rental as compensation for the mere occupation of the land by the other railways.

I am not quite sure that I rightly apprehend paragraph 26 of the case, but I understand the arbitrator to say that in his opinion, taking the other circumstances of the case into consideration—the circumstances of the railway companies which effected the purchase, and of the railway company from which the purchase was effected—he is satisfied that 9000*l.* a year does not represent merely the value of the user of the line. If such be his meaning, that displaces the inference, and there is no reason whatever why we should not fall back upon the principle which is now, after many years of difficulty, established; and it does seem to me that in a case of this kind it would be peculiarly undesirable to establish any exceptional principle, because the effect of that

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would be to drive us into a region of speculation as to which there would be no end. It is all very well to say now—immediately after or within a very few years of 1870 or 1871, when this change of circumstances took place—that it is possible to form some speculation as to what the earnings of the company would have been if this agreement had not been carried out; but if Mr. McIntyre's contention is correct, the same calculation must be made 50 or 100 years hence; and 50 or 100 years hence, who can say what will be the hypothetical value that a hypothetical tenant under hypothetical circumstances—none of these hypotheses being answered by the reality—would give for the use of the line? It seems to me that to point this out is really to answer the contention that this piece of line must be exceptionally rated.

I am therefore of the same opinion as my learned brother that the appellants are entitled to our judgment.

W. J. B.

Against this decision the respondents appealed. (1)

April 20, 21. *Sir R. E. Webster, Q.C., A.G., McIntyre, Q.C.*, and *Cyril Dodd*, for the respondents. The agreement of 1871 and the Act confirming it had not the effect of amalgamating this line with and making it an integral part of the lines of the three companies. The original company still exists as an independent company, and the line as an independent line; and the line must be rated as such at the rent which a tenant from year to year would give for it. The effect of paragraph 22 of the case is that such a rent would be sufficient to support the rate. The three companies themselves may be considered as possible tenants: *Reg.* v. *School Board for London* (2); and the rent they actually give is an element for consideration in estimating the rent a possible tenant would give. They are not, however, to be considered as the only possible tenants, because, just in the same way as the legislature has sanctioned the existing lease, they might sanction by further legislation a letting on other terms

(1) The terms "appellants" and "respondents" are used throughout with reference to the appeal to the Quarter Sessions, not to that to the Court of Appeal.

(2) 17 Q. B. D. 738.

to other companies or persons. It is contended that, even as matters now stand, clause 33 of the agreement does actually give by implication power to let the line with the consent of the lessors; and therefore there may be a tenant other than the three companies; and it is not correct to say that such a tenant must be considered to hold under exactly the same conditions as the three companies, and that consequently the rateable value must be ascertained exactly in the same way as if the line was an integral part of the lines of the three companies. Such a tenant might occupy this as a toll-earning line, and it is sufficiently found in the case that so occupied it would command a rent sufficient to support the rate. [They cited *South Eastern Ry. Co.* v. *Dorking* (1); *Clark* v. *Fisherton Angar* (2); *Reg.* v. *Great Western Ry. Co.* (3)]

Sir E. Clarke, Q.C., S.G., F. M. White, Q.C., and *Tyrrell T. Paine,* for the appellants. The line must be treated for rating purposes as it exists and is worked under the agreement and the Act confirming it, viz., as an integral part of the lines of the three companies; there cannot under the circumstances possibly be an actual occupier of the line other than the three companies, and the hypothetical tenant must be looked upon as holding it under the same conditions as those under which it is actually and in fact held by the three companies. The three companies only work it under the agreement and confirming Act as part of their lines, and not as a toll-earning line. The agreement is a statutory agreement, and the line must be occupied by the present occupiers in conformity with the terms of such agreement. The general practice in rating railway companies and water companies, and such undertakings, is to treat the actual occupier as the only possible tenant, and ascertain from the gross receipts, by a well-settled process of elimination of other elements, the annual value of the occupation, which is to be regarded as the rent which the hypothetical tenant would give on a tenancy from year to year: *Reg.* v. *Great Western Ry. Co.* (3) This mode of procedure ought to be adopted in the present case, the line being actually used under a statutory agreement by the three companies just as

(1) 3 E. & B. 491, 499; 23 L. J. (M.C.) 84. (2) 6 Q. B. D. 139.
(3) 15 Q. B. 379, 1085.

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if it were part of their lines. Paragraph 22 of the case does not amount to a finding at what rent the line might be reasonably expected to let as a separate hereditament, and, if the contention in paragraph 13 is not correct, the case ought to go back to the arbitrator to ascertain such rent. [They cited *Corporation of Worcester* v. *Droitwich Assessment Committee* (1); *Altrincham Union* v. *Cheshire Lines Committee.* (2)]

Sir R. E. Webster, Q.C., A.G., was not called on to reply.

LORD ESHER, M.R. The case as stated by the arbitrator appears to raise two questions, viz., whether the contention of the appellants as stated in paragraph 13 of the case is correct, and, if it is not, then whether the findings of the arbitrator in paragraph 22 are sufficient to enable the Court to deal with the case in what it thinks the correct mode. The general rule of law on the subject of estimating the rateable value of a hereditament is not in dispute, and cannot be, for it is laid down by the Parochial Assessment Act; the difficulty lies in its application to the circumstances of the particular case. In many cases questions of this kind have been raised, and what the Courts have done over and over again is to say that the particular mode of estimating the rateable value adopted in the particular case before them was not under the circumstances contrary to the rule of law laid down by the statute; but I do not think they meant to say that such mode of applying the rule so laid down was necessarily and in all such cases the only correct mode. The ingenuity of man may discover some fresh mode of adapting the rule as laid down by the statute to the circumstances of new cases, and it is impossible for a Court to say beforehand that no other mode of applying the statutory rule than that employed in the case before them can be correct. When the question before the Court is as to the rating of a railway, the Court must apply the statutory rule in that as in other cases, and see whether the mode of valuation adopted is in conformity with the Act or not. Where the case is that of one railway, that is, where a line is used throughout as one railway by one company, and owned by such company from terminus to terminus, or, if a portion of the line is

(1) 2 Ex. D. 49. (2) 15 Q. B. D. 597.

leased, only such company, and nobody else, is entitled to lease it, in such a case the Courts have said that it is not an incorrect mode of getting at the rateable value of part of the line in a parish to take the gross receipts of the line in the parish by allocating to it a proportion of the receipts in respect of traffic passing through the parish in accordance with the mileage run in the parish, and to deduct therefrom the expenses necessary to produce those receipts and the proper statutory allowances.

The Courts have said that such a mode of proceeding in such a case is not wrong, but I do not think they have ventured to say that it is necessarily and in all cases the only correct mode. They have frequently said that it is a very rough mode of estimating the value, but that, if no better way can be found, it is not a wrong mode. But the view so taken by the Courts applied to the ordinary case of one long homogeneous line of railway which could only be worked as one line, and if this were such a case it would apply here. The contention set forth in paragraph 13 is based on the assumption that this line must be treated as an integral portion of the lines of the three companies making use of it. The question is whether it is so. The line did not originally belong to the three other lines, or any one of them, but was an independent line belonging to an independent company. That company might have kept the line in their own hands, and then no such question as this could have arisen, and the receipts of the other companies could not have had anything to do with the rateable value of this line. Has this line under the circumstances which have occurred lost its character of an independent line? The company has entered into an agreement with the three other companies, which no doubt they could not have done without the sanction of an Act of Parliament. This is not the case of a company which cannot lease its line but is bound by Act of Parliament to manage its own line, for the legislature has confirmed the agreement and enacted that its stipulations shall have the same effect as if enacted by statute. But have the original company and the line as an independent line ceased to exist? The company still exists as an independent company and is entitled to certain privileges and burdened with certain obligations. It exists for the purpose of receiving the annual payment

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from the three companies and distributing the same among its shareholders. The line continues to exist, as it seems to me, as an independent line. Furthermore, there is, in my opinion, a power to lease the line. The 33rd clause of the agreement, which is to have the effect of an Act of Parliament, says that the lessees shall not assign, let, or part with the demised undertaking without the previous consent of the lessors under seal. It seems to me that according to the ordinary rules of construction this provision necessarily implies a power to let with the consent of the lessors. There is, moreover, apparently nothing to restrict the terms on which such a lease might be made so long as they are not inconsistent with any statutory enactments affecting the line. Therefore the case is one of an independent line belonging to an independent company which is let by them to other companies, and a power is given to the lessees, with the consent of the lessors, to let the line to a tenant who may hold the line on other terms than those on which the lessees hold it. That being so, this case is not the ordinary case of a portion of a line in a parish forming an integral part of a longer line. The question is, whether in such a case it is the proper way or a proper way of rating the line to treat it as an integral part of the three other lines. I do not think it is; because it seems to me that to do so would be to shut out of consideration the possible independent tenant to whom the line might under the terms of the agreement confirmed by Act of Parliament be let. For these reasons I am of opinion that the mode of valuing the line contended for in paragraph 13 is not the proper mode to adopt in this case. Then we have to see whether the arbitrator has in paragraph 22 sufficiently found what a hypothetical tenant from year to year might reasonably be expected to give as rent for this line under the circumstances in which it exists. Such a tenant is not necessarily to be considered as subject in all respects to the same conditions as the actual occupier, or bound by the terms of his tenancy, for so to consider him would frequently be contrary to the law as laid down by the statute. The supposed tenant must be considered to hold as tenant from year to year on the terms on which he might reasonably be expected to hold as such tenant, except so far as they may be forbidden by Act of

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Parliament. If an Act of Parliament says that the occupier of the property is to hold on such conditions as would render the premises incapable of commanding a rent, then in figurative terms the premises are said to be struck with sterility. The argument in this case seems to be that this line is struck with partial sterility, because it can only be considered as an integral portion of the lines of the three companies. For the reasons already given I do not think that is so. It might have been so perhaps but for the 33rd clause of the agreement, but it seems to me that that result is avoided by virtue of that clause, which by implication allows the premises, with the consent of the lessors, to be let to anybody. Then do the statements contained in paragraph 22 of the case enable us to say that a tenant of the line would give a rent sufficient to maintain the rate? I think the general result of what the arbitrator says in that paragraph is that he drew from the facts the inference that a tenant would give such a rent. He no doubt says that such an inference is necessarily a matter of speculation to a certain extent. That only amounts after all to saying that it is an inference. The facts on which he acted were clearly admissible in evidence, and, he was entitled, as it seems to me, to draw the inference from them. For these reasons I cannot agree with the conclusion arrived at by the Divisional Court, and I think this appeal must be allowed, and that the judgment upon the case should be for the respondents.

FRY, L.J. I am of the same opinion. The inquiry which we have to make is as to the amount of the rent at which the hereditament in question might reasonably be expected to let from year to year, for by deducting from such rent the statutory allowances the rateable value is to be estimated. The line which is the subject of the rate in this case is a line which was formed and for a time worked by an independent company, and which effected a junction between certain other lines of railway. But the original company gave up working the line, and an agreement was made in 1871, and afterwards confirmed by statute, by which a perpetual lease of the line was granted to the three other companies, the original company receiving what is called in the agreement a rent. It is not necessary to consider the exact nature

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of the legal relation created by this agreement. It is not a lease in the ordinary sense, for there is no reversion or power of re-entry. But the result at any rate was that the whole interest in the line was in the three companies and the original company together. The question now is, at what rent the line could reasonably be expected to let. In my judgment that question is answered by the 22nd paragraph of the case. The arbitrator had before him the facts with regard to the receipts prior to the agreement, the increase in the traffic, and the perpetual rent which the companies thought it worth while to give. It cannot be denied that these were matters which would be proper elements for consideration. I understand the arbitrator to have found that taking these matters into consideration there was ground for a reasonable expectation that a tenant from year to year would give a rent which would justify the assessment. He has added words to the effect that such an inference is necessarily to some extent speculative, but I do not think that does away with the effect of his finding. But then it is urged that in the present case there could be no such tenant of the line, or, if there could, the supposed tenant must be considered as subject in all respects to the same conditions as the lessees. I cannot follow that contention. It is not necessary to determine the point whether the term "hypothetical tenant," in the case of a railway company which could not as matters stood lease its line, or delegate its powers of using it, would include a possible tenant to whom the line might be leased by virtue of an Act of Parliament that might be obtained in the future. It is unnecessary to consider the point, because the agreement of 1871, which is to have the same effect as if it were enacted by statute, does in my opinion by implication give power to the lessors and lessees jointly to demise the property to whomsoever they please. That being the case I find no difficulty in considering that such a possible tenant may exist. But then it is said that he must be considered as holding subject to the same conditions as the lessees under the existing agreement. But I do not see that the tenant, in the case of a tenancy which may be granted under the 33rd clause of the agreement, must be considered as holding necessarily under the same conditions as the lessees. Then we

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are told that there is a general practice in the case of railways which ought to govern this case; that this line has become an integral part of the lines of the three companies; and where that is the case the principle laid down in *Reg.* v. *Great Western Ry. Co.* (1) applies. I cannot see that there is any such general principle as alleged applicable to the present case. There has been, as it seems to me, no absorption of this line in the lines of the other companies. It remains for many purposes distinct and capable of being separately let to a possible tenant. The Court in *Reg.* v. *Great Western Ry. Co.* (2) seems to have despaired of any satisfactory mode of applying the test given by the Act, and to have acted on the view that in that case the mode adopted was the only possible mode of determining the rent: but here a different mode of proceeding is open.

LOPES, L.J. This case raises an important question with regard to the principle upon which this line of railway should be rated. It is contended for the appellants that it ought to be regarded as an integral portion of the lines of the three companies and rated accordingly. It is argued on the other hand for the respondents that it ought not to be so treated, but that it ought to be assessed upon the amount of the rent which a tenant from year to year would give for it as an independent line. I am of opinion that the contention of the respondents is correct. I cannot agree with the decision of the Court below, for it seems to me that they have attributed to the agreement of 1871 an effect which it does not, I think, produce. That agreement is set forth in the schedule to the Act of Parliament by which it was confirmed, and it is provided in substance that every provision of the agreement shall have the same effect as if it were a section in the Act of Parliament. The Court below seems to have held that the effect of the agreement and Act confirming it was that this line was amalgamated with and formed part of the respective systems of the three other lines. I cannot put that construction upon the agreement. It was a lease in perpetuity, but I think it is clear that it contemplates the continued existence of the Junction Company and of their interest in the line. Several of

(1) 15 Q. B. 379, 1085. (2) 15 Q. B. 379, 1083.

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the clauses of the agreement point to this conclusion. The most important of those clauses, viz., the 33rd, provides that the lessees shall not assign, let, or part with the demised undertaking without the previous consent of the lessors under seal. It seems to me that the necessary implication from that provision is, that with the consent of the lessors the lessees may lease this line to another company or individual. If so, there could be a tenant of the line as contemplated by the Act relating to parochial assessment. The individuality of the Junction Company as an independent company, and of the undertaking as an independent undertaking, is carefully preserved. Therefore I think the line must be rated as an independent line on the rent which a tenant from year to year might be reasonably supposed to be likely to give for it. When that conclusion is arrived at, it seems to me that the statements in paragraph 22 of the case are conclusive against the appellants. For these reasons I think this appeal ought to be allowed.

Appeal allowed.

Solicitors for appellants: *Paine, Son, & Pollock.*

Solicitors for respondents: *Wright & Pilley, for Ruston, Clark, & Ruston.*

E. L.

[IN THE COURT OF APPEAL.]

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March 2, 4.

HULL, BARNSLEY, AND WEST RIDING JUNCTION RAILWAY AND DOCK COMPANY *v.* YORKSHIRE AND DERBYSHIRE COAL AND IRON COMPANY.

Railway—Tolls—Undue Preference—Unequal Charges—Traffic Arrangements —Agreement for through Rates between two Railway Companies—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 87, 88, 90.

Sect. 90 of the Railways Clauses Consolidation Act, 1845,—which provides that all tolls charged by a railway company shall be at all times charged equally to all persons, and after the same rate, in respect of all goods of the same description, passing only over the same portion of the line of railway under the same circumstances, and that no reduction or advance in any such tolls shall be made directly or indirectly in favour of or against any particular company or person travelling upon or using the railway,—does not prevent the company from making a special charge for goods carried over their railway, in pursuance of a traffic agreement with another company under s. 87 of the Act.

Appeal by the defendants against the judgment of Wills, J., at the trial of the action, without a jury, at the Leeds Spring Assizes, 1886.

The action was brought to recover tolls claimed to be due from the defendants to the plaintiff company in respect of the carriage of coal over the line of the plaintiff company from the defendants' Carlton Main Colliery, situate near Cudworth, which was connected by a siding with the plaintiffs' line, to Hull.

By their statement of defence the defendants alleged that the plaintiffs claimed to charge them a higher rate per ton than they were justified, under s. 90 of the Railways Clauses Consolidation Act, 1845, in charging. It appeared that there was a junction, by means of sidings, at Cudworth, between the line of the plaintiff company and that of the Midland Railway Company, and, by an agreement between the latter company and the plaintiff company, the Midland Company charged a through toll per ton for the carriage of coal from other collieries situate on their line (at a distance from Hull greater than that of the defendants' colliery), over their line and the line of the plaintiff company to Hull. The agreement provided that the Midland Company should receive the through toll from their customers; that each railway should

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out of the through toll receive the sum of 2*d.* for "terminal" charges; and that the remainder should be divided between the two companies in proportion to the mileage, the Midland Company in no case (but that of a colliery called the Monk Bretton Colliery) receiving less than 6*d.* per ton. The apportioned part of the through toll which was allotted to the plaintiff company in respect of the carrying of the coal over their line from Cudworth to Hull was less than the rate per ton which the plaintiff company charged the defendants for the carriage of their coal from Cudworth to Hull. For instance, the apportioned part allotted to the plaintiff company of the through toll charged by the Midland Company for the carriage of coal viâ Cudworth from the Masborough Colliery, situate on their line sixteen miles further from Hull than the distance of the defendants' colliery from Hull by the plaintiffs' line, over the plaintiffs' line to Hull was 2*s.* 1¾*d.*, whereas the rate per ton charged by the plaintiff company to the defendants for the carriage of their coal from Cudworth to Hull was 2*s.* 10*d.*

The agreement between the Midland Company and the plaintiff company for the charge of through tolls was made under s. 87 of the Railways Clauses Consolidation Act, 1845.

The action was tried at Leeds, before Wills, J., who gave judgment for the plaintiffs, on the ground that through traffic carried under an arrangement between two companies, in pursuance of s. 87 of the Railways Clauses Consolidation Act, could not be considered to be traffic carried "under the same circumstances," as that which was carried upon one line of railway only.

The defendants appealed.

A. Charles, Q.C., J. E. Barker, and *C. Gould*, for the defendants. Sect. 90 (1) of the Railways Clauses Act applies. The

(1) Sect. 87: "It shall be lawful for the company from time to time to enter into any contract with any other company, being the owners or lessees or in possession of any other railway, for the passage over or along the railway by the special Act authorized to be made, of any engines, coaches, waggons, or other carriages of any other company, or which shall pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, waggons, or other carriages of the company, or which shall pass over their line of railway, upon the payment of such

coals carried from the collieries situate on the Midland line and the coals from the defendants' colliery are carried over the same portion only of the Hull and Barnsley line, and "under the same circumstances." By "the same circumstances" is meant the same circumstances as regards the railway company, i.e., the same amount of labour and cost to them. The question is, do the railway company perform the same services in each case? *London and North Western Ry. Co.* v. *Evershed.* (1) The argument for the plaintiffs must go this length, that they might, if they pleased, carry goods coming from the line of another railway company for nothing. The substance of the case is, that the collieries on the Midland line obtain an undue preference over the defendants' colliery, and this is contrary to s. 90: *Oxlade* v. *North Eastern Ry. Co.* (2); *Ransome* v. *Eastern Counties Ry. Co.* (3); *Harris* v. *Cockermouth and Workington Ry. Co.* (4) Wills, J., has

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tolls and under such conditions and restrictions as may be mutually agreed upon; and for the purpose aforesaid it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways."

Sect. 88: "Provided always, that no such contract as aforesaid shall in any manner alter, affect, increase, or diminish, any of the tolls which the respective companies, parties to such contracts, shall for the time being be respectively authorized and entitled to demand or receive from any person or any other company, but that all other persons and companies shall, notwithstanding any such contract, be entitled to the use and benefit of any of the said railways, upon the same terms and conditions, and on payment of the same tolls, as they would have been in case no such contract had been entered into."

Sect. 90 provides that "it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

(1) 3 App. Cas. 1029, 1035.
(2) 1 C. B. (N.S.) 454.
(3) 1 C. B. (N.S.) 437.
(4) 3 C. B. (N.S.) 693.

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in effect decided that wherever there is a "through route" and a "through rate" s. 90 does not apply.

Denaby Main Colliery Co. v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) shews that the defendants would be entitled to apply to the Railway Commissioners.

Forbes, Q.C., and *H. Sutton*, for the plaintiffs. An agreement for through rates made between two railway companies under s. 87 of the Railways Clauses Act is excepted from s. 90 by virtue of the proviso in s. 88 that no such agreement "shall in any manner *diminish* any of the tolls which the respective companies shall be respectively authorized to demand from any person." But it is argued that the existence of the through rate is to diminish the toll which the plaintiff company are authorized to demand from the defendants. The apportioned part of a through toll charged under such an agreement is not the subject of comparison under s. 90 with the toll charged in respect of carriage only over that portion of the line of the one company which is used in both cases. Such a case is not within s. 90 at all.

[They were stopped by the Court.]

Charles, Q.C., in reply.

LORD ESHER, M.R. In my opinion this appeal must be dismissed, and I think that in dismissing it we are affirming the judgment of Wills, J., upon the ground on which it was really based. I take it that in substance his judgment was this: that, if he acceded to the argument which was addressed to him for the defendants, he would be interfering with and upsetting all the traffic arrangements made between railway companies throughout the kingdom. Therefore his judgment, as it seems to me, comes to this, that the through traffic arrangements between railway companies, which are made by virtue of s. 87, and the consequences of which are governed by s. 88, are taken out of s. 90. I agree with this view, because, these arrangements being made under s. 87, and the consequences of them being pointed out in s. 88, it is impossible, when you are comparing the through charge which is paid under such an agreement with the toll which is paid by an individual, to say that the circumstances are

(1) 11 App. Cas. 97.

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the same. Sects. 87 and 88, which give power to make these arrangements, prevent the tolls charged under them from being compared with any toll which is charged to an individual under s. 90; the circumstances are thereby made different. The case, when you look at it in that way, is quite clear, and I think the judgment of Wills, J., ought to be affirmed.

BOWEN, L.J., concurred.

FRY, L.J. I entirely agree. I am inclined, perhaps, to take a slightly different view of the construction of the Act. It seems to me that s. 87 gives power to railway companies to apportion the tolls for a through rate amongst themselves by agreement. Then s. 88 provides, "That no such contract as aforesaid shall in any manner alter, affect, increase, or diminish, any of the tolls which the respective companies, parties to such contracts, shall for the time being be respectively authorized and entitled to demand or receive from any person or any other company." It appears to me that to hold that the taking of an apportioned part of a through toll, when that apportioned part is smaller than the toll charged for the transit simply over the part of the line which is used in common, gives a right under the 90th section to the person who is charged with the latter toll to require it to be reduced, would result in this, that the contract between the two companies would diminish the tolls which one of the companies is entitled to demand. The proviso in s. 88 seems to me to shew that an apportioned part of a through rate under s. 87 is not to be deemed a toll under s. 90.

Appeal dismissed.

Solicitors for defendants: *Geare, Son, & Pease, for Wake & Sons, Sheffield.*

Solicitor for plaintiffs: *A. R. Oldman, for Moss, Lowe, & Co., Hull.*

W. L. C.

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March 18.

[IN THE COURT OF APPEAL.]

EX PARTE BRODERICK. IN RE BEETHAM.

Equitable Mortgage—Oral Promise—Subsequent Oral Direction to hold Title Deeds as Security—Statute of Frauds—Part Performance.

The bankrupt, being indebted to a banking company, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, and who held the title deeds. The mother afterwards died, and the title deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told the bankrupt that he had possession of the deeds, and that he held his (the bankrupt's) one-fifth for the bank. The bankrupt expressed his assent:—

Held (affirming the decision of the Queen's Bench Division), that the company had not a valid equitable mortgage of the bankrupt's share in the farm, for there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute.

APPEAL from the judgment of the Queen's Bench Division (Cave and Wills, JJ.) which reversed a decision of the judge of the County Court at York.

The case is reported ante, 380, where the facts are fully stated.

Everitt, Q.C., and *Luck*, for the appellant. First, the letter of May 28 of itself constituted an equitable mortgage. It was given in pursuance of the previous conversation with the directors of the bank, and was accepted by them as a fulfilment of the promise which the bankrupt then made to give the bank security for his debt. The forbearance of the bank to enforce payment of the debt was a sufficient consideration for the agreement to give security. The title-deeds of the property could not be then handed over to the bank, because the bankrupt's interest was only a reversionary one. Parol evidence is admissible to shew what the debt was in respect of which the security was to be given. A promise to execute a mortgage "whenever required," if given for good consideration, creates an equitable mortgage,

even if no title-deeds are deposited: *Dighton* v. *Withers*. (1) A purchaser for value with notice of the agreement would be bound by it, and the trustee in bankruptcy of the person who made the promise would take the property subject to it. A parol acceptance of a written offer to give security is sufficient to constitute a binding agreement for a security: *Reuss* v. *Picksley*. (2) There may be acceptance by acts, and the obtaining of forbearance on the faith of an offer will constitute an agreement: *Alliance Bank* v. *Broom* (3); *Card* v. *Jaffray*. (4) A direction to retain title deeds as security for a debt will constitute an equitable mortgage for the debt: *Fenwick* v. *Potts*. (5)

Secondly, if the letter of May 28 did not create an equitable mortgage, the authority given by the bankrupt to his brother to hold the deeds for the bank amounted to a part performance of the original oral promise to give security to the bank, and is sufficient to exclude the Statute of Frauds: *Daw* v. *Terrell*. (6) If there is an oral promise to give security, and the person who has made the promise does all that is in his power to give effect to it, either by handing over the title-deeds of property or by procuring another person who holds the deeds to undertake to hold them (subject to his own prior claim) for the person to whom the promise has been made, a good equitable mortgage is constituted.

If the person who has a right to direct the holder of title deeds what he is to do with them directs him to hold them for A. B., and he assents to the direction, a good equitable mortgage of the property comprised in the deeds is thereby created in favour of A. B. In *Daw* v. *Terrell* (6) the owner of three properties, the title deeds of one of which were held by his bankers as security, deposited the title deeds of the other two with the plaintiff as security for a debt, and gave him an order to the bankers (written by himself but not signed) to deliver over the title deeds of the third property to the plaintiff, as soon as their lien was satisfied, and Lord Romilly, M.R., held that the plaintiff had a valid equitable mortgage on the third property.

(1) 31 Beav. 423.
(2) Law Rep. 1 Ex. 342.
(3) 2 Dr. & Sm. 289.
(4) 2 Sch. & Lef. 374.
(5) 8 D. M. & G. 506.
(6) 33 Beav. 218.

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[FRY, L.J. In that case there was an agreement accompanied by an act—the delivery over of the title deeds of two of the properties. There being that act, the Court was entitled to inquire what the agreement was which led to it. But what authority is there for holding that the mere words of one of the contracting parties will amount to part performance of a prior oral agreement?]

Ambrose, Q.C., and *J. Broughton Edge*, for the respondent, were heard only upon the question whether the company had accepted the offer made by the letter of May 28.

Luck, in reply.

LORD ESHER, M.R. The question is whether an equitable mortgage of certain property of the bankrupt has been created; if not, the trustee in the bankruptcy is entitled to the property. It is argued that the letter of May 28, 1874, of itself, without anything else, constituted an equitable mortgage, because it is a promise by the owner of the property to give a mortgage on it. But the letter seems to me to constitute only an offer by the bankrupt, and not to be a contract. The bank were not bound to accept the offer, and, in order to constitute a contract, it was necessary that there should be an acceptance by them, but, if the offer had been accepted by them, I am strongly inclined to think that there would have been a contract for an equitable mortgage, and that the letter, though written before the contract was complete, would have been a sufficient memorandum in writing of the contract within the Statute of Frauds. The question, therefore, is whether those who set up the equitable mortgage have made out an acceptance of the offer by the bank? [His Lordship then referred to the facts, and commented on the evidence, which, he held, proved that the directors of the bank accepted the oral promise of the bankrupt to give the bank security for the debt which he owed them. But he was not satisfied that the directors ever accepted the letter of May 28 as a fulfilment of the oral promise; he was inclined to think that the directors never saw the letter and never accepted it. His Lordship continued:—] If this be so, there was nothing but the oral promise of the bankrupt to give the bank security, and

that is not enough to satisfy the Statute of Frauds. In order to take the case out of the statute it must be shewn that there has been performance or part performance of the oral promise. What is relied on as a part performance? It is said that the title deeds of the property were deposited with the bank. The deeds were in the first instance in the possession of the bankrupt's mother as tenant for life, and after her death they were delivered to the elder brother (who was the general manager of the bank), for some purpose connected with the payment of succession duty. They were not delivered to him by the bankrupt, but the bankrupt was told by the elder brother that they were in his possession, and that he held them as to one-fifth of the property for the bank, and the bankrupt expressed his assent to this. But nothing more was done with the deeds; they were left in precisely the same position. Nothing was done, except that the one brother said something and the other said something in reply. Was this such a part performance of the original oral promise as will take the case out of the statute? Cave, J., in his judgment enunciated this proposition (1): "There is in fact, so far as I am aware, no case which goes the length of holding that, where a third person already has possession of title deeds for another purpose, an oral communication from a part owner of the property to which the title deeds relate, purporting to make such third person a trustee of the deeds for a creditor, can create a good equitable mortgage in favour of that creditor; indeed, to hold so would be entirely to repeal the Statute of Frauds so far as the creation of equitable mortgages is concerned." I take that proposition to amount to this—that where there is a mere oral promise to do something, and nothing takes place afterwards but the speaking of more words by the parties—when nothing more is done in fact—there is no part performance which can exclude the application of the Statute of Frauds. I entirely agree that the statute cannot be excluded by the speaking of more words by the person who gave the original oral promise. If the owner of goods deposited in a warehouse entered into an oral agreement to sell them, and then went to the warehouseman and said to him, "You are to hold the goods no longer for me, but for the person to whom I

(1) 18 Q. B. D. p. 383,

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have sold them," and the warehouseman then transferred the goods in his books into the name of the purchaser, there would be an act done which would amount to part performance, and would exclude the operation of the statute. But in the present case there was nothing in addition to the original oral promise but the speaking of more words, and, to my mind, that does not constitute a part performance of the promise.

BOWEN, L.J. I am of the same opinion. Taking the letter of May 28 in the most favourable view, I think it amounts only to an offer. Was it given by the bankrupt or received by the bank as a business document? Was it intended to have any effect on the rights of any one? Looking at the evidence, I think it would be most unsafe to hold that it conferred any right. I do not dissent from the view expressed by the Master of the Rolls.

With regard to the other point, it is certain that there was an oral promise by the bankrupt to give the bank some security. But the law does not allow a mere oral promise to confer any rights on the promisee, unless it has been followed by part performance. It is argued, on the authority of *Daw* v. *Terrell* (1), that there has been part performance in the present case. The title deeds of the property being in the possession of the bankrupt's elder brother for one purpose, he was told by the bankrupt to hold them as to his one-fifth of the property on behalf of the bank. I agree that that is not enough. If anything had been done which changed the position of the parties the case would have been different. But, in order that there should be a part performance of a promise, there must be a performance in part of that which was promised to be done. I cannot see that anything was done in the present case which produced any change in the legal rights of the parties. If we were to hold that there had been a part performance we should, as Cave, J., said, be repealing the Statute of Frauds so far as the creation of equitable mortgages is concerned. I think that *Daw* v. *Terrell* (1) is not at all in point. I entirely agree in the comments which have been made upon it from the Bench during the argument, and which are condensed in the judgment of Cave, J. (2)

(1) 33 Beav. 218. (2) Ante, 383.

Fry, L.J. I am entirely of the same opinion. In my opinion the directors of the bank never accepted the letter of May 28 as a security. They did not rely on it at all. And, as to part performance, I entirely concur in the view that the words spoken by the bankrupt to his brother as to the custody of the deeds do not amount to a part performance of the verbal contract to give the bank security so as to exclude the Statute of Frauds.

Appeal dismissed.

Solicitors for appellants: *Clarke, Rawlins & Co., for Willan & Raine, Darlington.*

Solicitors for respondent: *Torr & Co., for Cockcroft, Rochdale.*

W. L. C.

HATCHARD *v.* MÈGE and Others. *April* 1.

Executor—Actio personalis moritur cum personâ—Libel—Publication injurious to Property—Slander of Title—Death of Plaintiff—Continuance of Action by Personal Representative—Rules of Supreme Court, 1883, *Order XVII., rr.* 1, 2.

An action for defamation, either of private character or of a person in relation to his trade, comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives:—

Held, therefore, that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage.

Application by the plaintiff for a new trial.

The statement of claim, so far as material to the point decided, was as follows:—

Paragraph 1 alleged that the plaintiff was a wine merchant and importer, and the registered proprietor of a trade-mark thereinafter described, and a dealer in a brand of champagne introduced by him and known as "the Delmonico" champagne.

Paragraph 4 alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine

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merchant and importer the following false and malicious libel that is to say,

'Caution: Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico Champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,' thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavouring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word 'Delmonico' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom.

"5. In consequence of the publication of the libel aforesaid, the plaintiff has been greatly injured in his credit and reputation, and in his said trade and business of a wine merchant and importer and dealer in champagne.

"The plaintiff claims,

* * * * *

"(3.) 1000*l.* damages in respect of the publication of the said libel.

"(4.) An injunction restraining the defendants, their servants or agents, from continuing the publication of the said libel or any other advertisement or notice to a similar effect."

After the close of the pleadings the original plaintiff died, and an order was made by the master under Order XVII., r. 2, that the action should be carried on in the name of his executrix.

At the trial Lord Coleridge, C.J., after hearing the opening statement of counsel for the plaintiff, directed a nonsuit to be entered, on the ground that the action came to an end on the death of the original plaintiff.

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Morton Daniel, (*F. E. Cole*, with him), for the plaintiff. This is not merely a personal action for defamation, to which the maxim "actio personalis moritur cum personâ" applies. The innuendo shews that the publication is calculated to injure the plaintiff's property in his trade-mark, and special damage is alleged, which, if proved, would entitle the executrix to a verdict. This distinguishes the present case from such cases as *Chamberlain* v. *Williamson*. (1) If a wrong committed in the testator's lifetime causes damage to his personal estate, his personal representative can sue: *Twycross* v. *Grant*. (2) The present claim, so far as it alleges injury to the property in the trade-mark, is not really a claim in respect of a libel, but is rather in the nature of slander of title, which clearly comes within the rule of law stated in 1 Williams on Executors, 8th ed. pp. 797, 798: "The Act 4 Edw. 3, c. 7, being a remedial law, has always been expounded largely; and though it makes use of the word '*trespasses*' only, has been extended to other cases within the meaning and intent of the statute. Therefore, by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased himself might have had, whatever the form of action may be."

Kemp, *Q.C.*, and *T. J. Bullen*, for the defendants. The statement of claim shews no cause of action which can survive to the executrix. The claim is to recover damages for a libel, which clearly cannot survive. If a claim in the nature of slander of title is relied upon, the answer is that there is no sufficient allegation of special damage, proof of which is essential to the establishment of such a cause of action.

[They referred to *Ireland* v. *Champneys* (3); *Phillips* v. *Homfray*. (4)]

Morton Daniel replied.

DAY, J. This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement

(1) 2 M. & S. 408.
(2) 4 C. P. D. 40.
(3) 4 Taunt. 884.
(4) 24 Ch. D. 439.

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of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleges two distinct grievances. The first claim was for infringement of the plaintiff's trade-mark, but that was abandoned at the trial. The second claim is contained in paragraph 4, which sets out a distinct cause of action. The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine-merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in Odgers on Libel and Slander, c. v.,

p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be et damnum et injuria. The injuria consists in the unlawful words maliciously spoken, and the damnum is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shewn injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim.

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WILLS, J. I am of the same opinion. The question is not free from difficulty, and it has to be decided on principle. As the case now stands we must take it that it is alleged that the deceased plaintiff was the owner of a trade-mark, and that the defendants published a statement that whoever buys Delmonico champagne buys a spurious article. It is also alleged that this statement is false and malicious, and that it has caused special damage. It is true that special damage is not alleged so specifically as it might have been, but I think any reasonable person reading this statement of claim would see that it meant that special damage in the way of injury to trade had been suffered. It seems to me, therefore, that the injury complained of by this part of the statement of claim is not an injury to the deceased plaintiff personally, but an injury to his property in the trade-mark and brand of Delmonico champagne. It is clear that the right to a trade-mark is a right of property. This is apparent from the decision of the House of Lords in *Wotherspoon* v. *Currie* (1), where it was held that, in order to entitle a manufacturer to an injunction to protect his trade-mark, it was not necessary to shew any wrongful intention on the part of the person against whom the injunction was asked for.

Here the defendants are alleged to have published a statement that the Delmonico champagne imported and sold by the plaintiff was spurious. It seems to me that this is an allegation of a direct injury to property, which falls within the liberal construction of the Act of 4 Edw. 3, c. 7, adopted by the modern decisions. The case of *Twycross* v. *Grant* (2) seems to me to be a strong authority in favour of this view. Bramwell, L.J., there said: "It is clear that at common law the rule as to torts was correctly expressed by the maxim, 'Actio personalis moritur cum personâ.' This rule was greatly altered at an early stage of our legal history by 4 Edw. 3, c. 7, and this statute, being remedial in its nature, and also those amending it, have been construed very liberally; they have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature."

Brett, L.J., in the same case, said: "Wherever a breach of

(1) Law Rep. 5 H. L. 508.

(2) 4 C. P. D. 40.

contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shewn upon the face of the proceedings that an injury has accrued to the personal estate."

Cotton, L.J., said: "It has been argued that this is an action to recover damages: in one sense that is true; but it is an action for a wrong done, not to the intestate himself, but to his property; therefore the right to sue upon his death was transmitted to his personal representative. For the defendant, reliance has been placed upon the judgment of Lord Chelmsford in *Peek* v. *Gurney* (1); it is sufficient to say that, in the opinion of his Lordship, the executors of the deceased director were not liable, because his estate derived no benefit from the misrepresentation to which he was a party; here the personal estate of the intestate was injured. The difference between the two cases seems to me very great."

Twycross v. *Grant* (2) was an action for fraudulent misrepresentation, but I cannot see the distinction in principle between that case and the present, for if the statement of the law in *Twycross* v. *Grant* (2), to which I have referred, is correct, it follows that here the action is maintainable.

As to the rest of the action, it is clear that the claim in respect of a libel on the plaintiff in the way of his trade does not survive; but assuming that the statement was calculated to bring the plaintiff's trade-mark into disrepute, and so damage his property, the executrix may succeed in establishing a cause of action in respect of which she can recover; and therefore, as to that part of the claim I am of opinion that there ought not to have been a nonsuit.

Order for a new trial.

Solicitors for plaintiff: *Slark & Metcalfe.*
Solicitor for defendants: *J. Anderson Rose.*

(1) Law Rep. 6 H. L. 377, at pp. 392, 393. (2) 4 C. P. D. 40.

P. B. H.

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April 1, 2, 22.

HADDON, Appellant; HADDON, Respondent.

Husband and Wife—Judicial Separation—Order of Justices upon Conviction of Husband for aggravated Assault upon Wife—Resumption of Cohabitation, Effect of—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 4.

Upon the conviction of a husband for an aggravated assault on his wife, justices made an order, under s. 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband, and that he should pay to her a weekly sum for her maintenance. The wife subsequently resumed cohabitation with her husband for a time, and then again left him:—

Held, that the order was annulled by reason of the subsequent resumption of cohabitation, and therefore that the wife could not enforce payment of weekly sums alleged to have become due under it after she again left her husband.

Case stated under 20 & 21 Vict. c. 43.

On September 30, 1882, the appellant was summarily convicted before certain justices of the county of Leicester of an aggravated assault upon his wife, the respondent; and the justices duly made an order, under s. 4 of the Matrimonial Causes Act, 1878, that the respondent should be no longer bound to cohabit with the appellant, and that he should pay to her weekly the sum of 1*l.*

In November, 1882, the appellant and the respondent resumed cohabitation, and continued such cohabitation until November, 1883, when the respondent left the appellant, and did not again live with him.

On March 26, 1884, the respondent made a complaint against the appellant to recover 15*l.*, which was then alleged to be due under the order of September 30, 1882; and on the hearing of that complaint the appellant contended that, in consequence of the respondent having resumed cohabitation with him, he was not liable to pay any further sums under that order; but the justices who then heard the case ordered him to pay the amount, and he thenceforth continued to make the weekly payments until some time in the year 1886.

On November 13, 1886, the respondent made a complaint before two justices of the county of Leicester to recover the sum of 8*l.*, being the arrears for eight weeks then alleged to be due under the order of September 30, 1882. Upon the hearing of that complaint the justices granted a distress warrant on the

goods of the appellant to levy the same sum of 8*l.* and costs, and stated this case on his application.

The question for the opinion of the Court was whether the order for judicial separation of September 30, 1882, and payment of the weekly sums under that order, could then be enforced against the appellant, or whether that order had been annulled by reason of the subsequent cohabitation of the appellant and respondent.

R. O. B. Lane, for the appellant.

Sills, for the respondent.

The arguments are sufficiently stated in the judgments of the Court.

Cur. adv. vult.

April 22. The following judgments were delivered:—

HAWKINS, J. The question in this case is whether an order made by justices under s. 4 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), that a wife shall no longer be bound to cohabit with her husband, and that he shall pay to her a weekly sum, is avoided, or merely suspended, upon the parties subsequently renewing cohabitation.

By the section above mentioned it is enacted that: "If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide" (inter alia) "that the husband shall pay to his wife such weekly sum as the court or magistrate may consider in accordance with his means," &c.

On September 30, 1882, the appellant, who is the husband of the respondent, was summarily convicted by magistrates of an aggravated assault on the respondent; and such magistrates duly ordered that the respondent should be no longer bound to cohabit with the appellant, and that the appellant should pay to the respondent the weekly sum of 1*l.*

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In the following month of November, 1882, the appellant and the respondent resumed cohabitation, and such resumed cohabitation continued for about a year—that is to say, until November, 1883, when it ceased (for what reason or under what circumstances is not stated in the case); and the parties have not since lived together. After this final separation many weekly payments were made under orders of justices enforcing the above-mentioned order, and otherwise; but my judgment is not in the least degree affected by that fact, for no submission to an order which has ceased to have legal existence can give it renewed vitality.

It is clear that the order for payment of a weekly sum is merely accessory to the order releasing the wife from the obligation to cohabit with her husband, and is intended merely as a mode of compelling him to provide for her a maintenance during the time of her separation from him under the order which his cruelty has driven her to obtain. It seems to me to follow that with resumed cohabitation the obligation to pay such maintenance ceases, at least for so long a time as the reconciliation lasts. That, I think, may be taken for granted.

The question, however, in the present case is whether the effect of such reconciliation and resumed cohabitation is to terminate absolutely from thenceforth the legal effect of the order, or merely to suspend its operation until some fresh aggravated assault is committed upon the wife, which makes it necessary for her again to live apart from her husband, or until she thinks fit again to separate herself from him.

In my opinion the effect is to put an end to the legal existence of the order, and to render it no longer operative. The court or magistrate has only power to make the order for separation if satisfied that the future safety of the wife is in peril, and when made, the only effect of it is to release her from any *obligation* to cohabit, leaving her at full liberty to do as she pleases. If before acting upon the order she thinks fit to abandon it—to become reconciled to her husband and to continue to cohabit with him—she may do so. So, also, after separation for a time she may return to cohabitation. But in either of these events the validity of the order ceases, just as a decree for judicial separation would under similar circumstances.

It is impossible to suppose that the legislature, in giving magistrates power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from, and resume cohabitation with, her husband when and as often as she should think fit, and compel her husband to maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation. It was suggested by Mr. Sills that the status of the wife was altered by the order. I do not agree in this. The order does not affect her status as a wife at all; it merely gives her the power, if she pleases, to live separate from her husband, the language of it being, she "shall be no longer *bound* to cohabit." It was further suggested that, even though cohabitation may have been resumed, the order might be revived by a fresh assault. I am not of that opinion. If, after resumption of cohabitation, fresh assaults of an aggravated character are made by the husband, so as again to imperil her safety, the wife must apply for a new order, and cannot again avail herself of that which by her own act in returning to cohabitation she has exhausted. It was further argued that the 4th section of the Matrimonial Causes Act having provided that the court or magistrate may vary orders for payment on proof of the altered means of either husband or wife, and may discharge an order for payment in the event of the wife's adultery, it must be taken that the legislature did not intend that orders made under that Act should be discharged for any other cause. The answer to this argument seems to me to be that the section in question only deals with orders for payment where the orders for separation continue in operation, leaving every order of separation made under it to "have the force and effect in all respects of a decree of judicial separation on the ground of cruelty." The orders for separation and payment of maintenance are distinct.

It remains only to say one word or two upon the very few authorities bearing upon the subject of judicial separations. In the case of *Bateman* v. *Countess of Ross* (1), Lord Eldon, speaking of the effect of a reconciliation of married persons after a separation,

(1) 1 Dow. 235.

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"held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it," adding that "this rested upon the ground of public policy, as it must not be permitted to parties to make agreements for themselves, to hold good whenever they chose to live separate." I am not aware that this general proposition has ever been dissented from. It was, indeed, suggested that in *Randle* v. *Gould* (1) the judges of the Queen's Bench did not adopt it. I do not, however, find a single expression at variance with it, for the decision in that case turned upon the language of the particular decree which was then under consideration, and not upon the general doctrine. In *Nicol* v. *Nicol* (2) the general principle stated by Lord Eldon was expressly recognised by the Court of Appeal. In *Linton* v. *Linton* (3) the Master of the Rolls (Lord Esher), in speaking of weekly alimony ordered to be paid to a wife by the Divorce Court under s. 1 of 29 & 30 Vict. c. 32, said, "They are not payments of a life annuity; they might be stopped at any moment if the husband and wife returned to cohabitation."

I am not aware that any authority exists directly bearing upon the question before us; nor have I been able to discover any in the least degree supporting the contention of the appellant.

I have, therefore, come to the conclusion that the existence of the order for separation and maintenance came to an end the moment the appellant and his wife became reconciled and resumed cohabitation.

This appeal, therefore, must be allowed, but, under the circumstances, without costs.

A. L. SMITH, J. I agree in the judgment just delivered of my brother Hawkins. I have had the advantage of reading it, and I only wish to add this: The order made by the justices is to have the force and effect in all respects of a decree of judicial separation on the ground of cruelty: such is the enactment in s. 4 of 41 & 42 Vict. c. 19. It is beyond question the law, as administered in the Divorce Court (as I have ascertained), that upon resumption of cohabitation a decree theretofore made of judicial

(1) 8 E. & B. 457. (2) 31 Ch. D. 524.
(3) 15 Q. B. D. at p. 245.

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separation on the ground of cruelty comes to an end. This, if inquired into, is beyond doubt. The reason is that the resumption of cohabitation puts an end to the cause for which the judicial separation was granted; and after such resumption of cohabitation, if proceedings are to be taken at all, they must be taken by a fresh suit.

In my judgment, the decision of the justices was erroneous.

Judgment for the appellant.

Solicitors for appellant: *Law & Worssam.*

Solicitors for respondent: *Longcroft & Wade, for Fowler, Smith & Warwick, Leicester.*

W. A.

WRIGHT *v.* THE WALLASEY LOCAL BOARD.

March 7.

Burial Acts—Burial Ground—"Dwelling-house"—Curtilage—Burial within 100 Yards of a Dwelling-house, Distance how to be measured—18 & 19 Vict. c. 128, s. 9.

By 18 & 19 Vict. c. 128, s. 9, no ground not already used as or appropriated for a cemetery shall be used for burials "within the distance of one hundred yards from any dwelling-house" without the consent of the owner, lessee, or occupier of such dwelling-house:—

Held, that the word "dwelling-house" did not, for the purposes of the Act, include the curtilage, and therefore that the specified distance must be measured from the walls of the dwelling-house.

ACTION tried before A. L. Smith, J., without a jury, at the Liverpool Winter Assizes, 1887.

The plaintiff claimed an injunction to restrain the defendants from using for burials a part of their cemetery lying near the plaintiff's dwelling-house. The facts are stated in the judgment.

Gully, Q.C., and *W. H. Butler*, for the plaintiff.

French, Q.C., and *Pickford*, for the defendants.

Cur. adv. vult.

March 7. A. L. SMITH, J., read the following judgment:—The short facts of this case are as follows: The defendants have buried a body or bodies at a distance of 102 yards from the plaintiff's cottage, measured from the walls thereof, but within

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100 yards of the curtilage belonging thereto, the curtilage being a piece of uninclosed ground around the cottage.

The question I have to decide is whether the defendants have committed a breach of s. 9 of 18 & 19 Vict. c. 128, or, in other words, what is the meaning of the word "dwelling-house" in that section.

By 15 & 16 Vict. c. 85, s. 25, it is enacted that "no ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground or as an addition to a burial ground under this Act nearer than two hundred yards to any dwelling-house without the consent of the owner," &c. By 18 & 19 Vict. c. 128, s. 9, the following was substituted for the above, which was repealed: "No ground not already used as or appropriated for a cemetery shall be used for burials under the said Act, or this Act, or either of them, within the distance of one hundred yards from any dwelling-house" without the consent, as above. These are the enactments relating to the point in hand. What does "dwelling-house" mean? Does it mean dwelling-house, or dwelling-house with its curtilage? The plaintiff insists that the word "dwelling-house" in these statutes must be construed as if the word appeared in a will or a conveyance, and must receive the same interpretation as has been put upon the word "house" in the 92nd section of the Lands Clauses Consolidation Act. It seems, upon looking into the authorities, that the principle upon which the word "house" has been and is held to include curtilage in a will or conveyance is that in such instruments a testator or grantor must have been taken to devise or grant, as the case may be, under the word "house" that which was ordinarily used with and which was necessary for the convenient use and occupation of the house itself. That, as it appears to me, is the reason why in such instruments "house" has been held to include curtilage. So also in the cases decided upon s. 92 of the Lands Clauses Consolidation Act, 1845. That section enacts that "no party shall be required to sell to the promoters a part only of any house." The Court, as it seems to me, put a similar interpretation in this section upon the word "house" for similar reasons, namely, that it was the manifest intention of the legislature that a man should not be bound

compulsorily to sell that part of his premises which was necessary for the convenient use and occupation of his house, and be left to use or keep the house shorn of the part which was necessary for its convenient use. This, as it appears to me, is the ratio decidendi of the cases upon the section, and the cases of *Steele* v. *Midland Ry. Co.* (1), *Marson* v. *London, Chatham, and Dover Ry. Co.* (2), and *Barnes* v. *Southsea Ry. Co.* (3), are good exemplifications of the principle. On behalf of the defendants some cases under the Markets Act of 1847 (4) were cited to shew that in the statute the term "dwelling-place or shop" was held not to include that which the terms might otherwise have been held to include in a will or conveyance. These cases were *McHole* v. *Davies* (5), *Fearon* v. *Mitchell* (6), and *Hooper* v. *Kenshole.* (7) They also insisted that, inasmuch as the Lands Clauses Act was expressly excepted from the Burials Act, the cases upon the Lands Clauses Act did not apply. I do not agree that they do not apply upon this ground. The real question is, does the principle upon which the word "house" in wills, conveyances, and the 92nd section of the Lands Clauses Act, has been held to include curtilage apply to these Burial Acts? First, why was the 100 yards limit enacted? It seems to me clearly, as was stated by Jessel, M.R., in *Lord Cowley* v. *Byas* (8), with a view to the health of the public. Secondly, this 100 yards limit is, as was pointed out by the same learned judge in the same case, a privilege to a landowner to prevent his neighbour using his own land as he otherwise would have been entitled to but for the statutory limit. Then why, I would ask, is this statutory obligation, which is imposed upon a man's neighbour, to be extended or diminished by reason of the largeness or smallness of the curtilage belonging to the man seeking to impose the obligation upon his neighbour? By 18 & 19 Vict. c. 128, as was pointed out in *Lord Cowley* v. *Byas* (8), a cemetery may now be made close up to the wall of a dwelling-house if the land up to such wall happens to belong to the cemetery owner; all that is

(1) Law Rep. 1 Ch. 275.
(2) Law Rep. 6 Eq. 101.
(3) 27 Ch. D. 536.
(4) 10 & 11 Vict. c. 14.
(5) 1 Q. B. D. 59.
(6) Law Rep. 7 Q. B. 690.
(7) 2 Q. B. D. 127.
(8) 5 Ch. D. at p. 951.

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prohibited in such a case is that for the distance of 100 yards from such dwelling-house no burial shall take place. As I have before said, to protect public health this provision is imposed. Assume now a dwelling-house with a curtilage of fifty yards between the dwelling-house and the cemetery-owner's property. Why in this case is the cemetery-owner to be prohibited from using his land for the distance of 150 yards from the dwelling-house, which is the plaintiff's contention, whereas if there had been no curtilage he could have utilized his land by burying bodies up to 100 yards from the dwelling-house? It cannot, I think, be truly said because the protection of public health requires that the curtilage should be protected, for if what I may call the curtilage were a pleasure ground, or garden, or such like, and there was no dwelling-house upon it, the cemetery-owner would be entitled to bury close up to the boundary between his land and the curtilage. This is not a question of the passing of property compulsorily under a statute, but it is solely a question as to from whence a certain 100 yards is to be measured. It was suggested by the plaintiff that, even if he were wrong as to his point about curtilage, yet there was upon his land a brick oven, and the defendants had buried a body within 100 yards of that, and this was true. It seems to me, however, that inasmuch as this oven was distinct and apart from the dwelling-house, it must be taken as being a building not a dwelling-house standing within the curtilage, and that whatever applies to the curtilage applies to it.

For these reasons I am of opinion that the plaintiff fails in his action, and that the prohibition prescribed by s. 9 of 18 & 19 Vict. c. 128, only applies to 100 yards measured from the walls of the dwelling-house itself, and I give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *J. W. Becket*, Liverpool.
Solicitors for defendants: *Simpson & North*, Liverpool.

W. A.

[IN THE COURT OF APPEAL.]

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March 21.

MALLET *v.* HANLEY AND ANOTHER (2). (1)

Parliament—Vexatious Opposition to Bill—Petitioner to pay Costs—Against whom Order may be made—28 & 29 Vict. c. 27, ss. 2, 3, 5.

A bill, promoted by the plaintiff, being before a parliamentary committee, a petition was presented against it in the name and under the seal of a company of which the defendants were directors. The committee reported that the promoter had been vexatiously subjected to expense on the promotion of the bill by the opposition of the defendants, petitioners against the bill, and that the promoter was entitled to recover a portion of his costs from the defendants. The bill of costs was accordingly taxed and a certificate obtained under 28 & 29 Vict. c. 27, and the plaintiff commenced an action and signed judgment for the certified amount. On an application to set aside the judgment and for leave to defend:—

Held (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), that the defendants not being the actual petitioners, the order on them to pay costs was made without jurisdiction, and could not be enforced.

THIS was an application made at chambers to set aside a judgment, and for leave to defend the action. It was referred to the Divisional Court. The judgment for an amount of costs certified by the taxing officer of the House of Commons under 28 & 29 Vict. c. 27, ss. 2, 3, 5, was signed in pursuance of a decision of the Court of Appeal, reported ante, p. 303, where the facts of the case are stated.

H. D. Greene, Q.C., and *H. Kisch*, for the defendants, in support of the motion. The defendants should be allowed to put in a defence, alleging want of jurisdiction in the committee of the House of Commons to make an order for costs against the defendants. The Court of Appeal left it open to the defendants to make the present application. The defendants have had no opportunity of being heard. A committee of the House of Commons has no power to make an order on persons not before it as petitioners. The company were the petitioners, for their name appeared on the petition which bore their seal. Under No. 129 of the Standing Orders of the House a petition must be in accordance with prescribed forms; it must be submitted to the

(1) See ante, 303.

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examiners, Orders 70, 71, and must pass the Court of Referees, which settles questions of locus standi before the bill goes to committee, Order 89.

Bigham, Q.C. (*T. Willes Chitty*, with him), for the plaintiff, shewed cause. The defendants wish to plead that they were not petitioners, and contend that this is a question of fact for a jury. But the question who was liable to pay the costs of the petition was raised, discussed, and decided by the committee. The defendants were represented before them by counsel, and the committee held them liable as being, in fact, the company.

H. D. Greene, Q.C., in reply.

LORD COLERIDGE, C.J. Application is made to us to set aside a judgment which has been entered for the amount of costs certified by the taxing officer on a certificate of a committee of the House of Commons given under circumstances and on a finding which I will presently state. It is now admitted that signing the judgment was regular. The Court of Appeal suggested that if the present course should be taken by the defendants, and the Court before which it was taken had reasonable ground for considering that the committee had exceeded its jurisdiction, it would be the duty of that Court to give some opportunity for raising that question by allowing a plea to be pleaded which would raise it. I do not understand the judgment of the Court of Appeal to be that, in their opinion on the facts, such a plea should be permitted, but I understand them to say that the leave of the Court must be obtained in order to enable the party to take such course as the defendants seek to adopt, and the Court, before it allows that course to be taken, must be reasonably satisfied that there is some ground for supposing that the committee have exceeded their jurisdiction. What, then, is this case? A private bill was applied for to authorize the abandonment of an Act for making certain tramways. This bill was opposed before the committee of Parliament. When the committee heard the case, with all the facts before them, they came to the conclusion that, although a company seemed to oppose, the persons who really conducted the opposition, and really caused the expense which the committee thought vexatious, were

the two gentlemen against whom they made the order, and they found as a fact that these two persons who opposed the bill were the real opponents. That finding was well within the jurisdiction of the committee, and they were quite warranted in coming to the conclusion at which they arrived. We have had the affidavits before us, and the strong fact that the counsel who appeared to oppose the bill stated more than once to the committee that he appeared for the two directors. He said, it is true, that he appeared for the company, and that they were the petitioners, but he never in any way qualified his statement that he appeared for the present defendants. It appears, not only from his statement, but from the affidavits, and there cannot be any doubt that, substantially, the petitioners were the two persons against whom the committee made the order, and whose conduct the committee thought vexatious. Here, then, is a judgment regularly signed in pursuance of an Act of Parliament expressed in the strongest possible terms. The committee of the House of Commons—indeed the House itself—having no means of enforcing its orders except by committal, both Houses of Parliament empower the committee to fix petitioners who have vexatiously opposed a bill with costs to be taxed by the taxing officer, whose certificate is to be conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same from the party therein stated to be liable to the payment thereof. There is a further provision that if this certificate is not complied with an action may be brought, and the plaintiff on filing, with the certificate, a declaration that the defendant is indebted to him in the sum mentioned in the certificate, is to be at liberty to sign judgment, and that "the validity of such certificate shall not be called in question in any court." It would be pressing those words too far to say that they were intended to prevent any such proceedings as these, and to vest in the committee power to disregard all legal rules, and to fix persons as petitioners who were never before them and not really liable. But it is not necessary to go so far. It is enough to say in this case that the committee had power to charge the persons who were really and substantially petitioners. I think that the jurisdiction did attach, and that this application should be refused. I desire to confirm my

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judgment by pointing out that if the opposite contention could be maintained the Act would be almost nugatory, for nearly every finding of a committee might be questioned in a court of law on the ground that the proceedings of the committee were erroneous, and therefore without jurisdiction. I do not place my judgment on the argument ab inconvenienti, although that is not without its weight.

MATHEW, J. I am of the same opinion. If I thought that any member of the Court of Appeal had intimated that there was a question in this case which ought to be raised by a defence, or in any other way, I should not concur in this judgment. But I am satisfied that what the Lords Justices meant was what has been done, viz., that it should be submitted to a Divisional Court to say whether there was any reasonable ground for the defence that the committee had proceeded without jurisdiction. What are the points presented against this judgment? Counsel for the defendants says there were two mistakes by the committee by which they gave themselves jurisdiction; first, a finding of fact, and second, one of law, both of them erroneous. The finding of fact was that these two gentlemen were petitioners. We have had affidavits before us, and I have not the slightest doubt that the committee was right. Secondly, it is said that the defendants were not petitioners within this Act, for the Act means the persons whose names are in the petition. I fail to find any such provision in the Act. I think, therefore, the judgment must stand.

Motion refused.

J. R.

The defendants appealed.

March 17. *H. D. Greene, Q.C.*, and *H. Kisch*, for the defendants. *Bigham, Q.C.*, and *T. Willes Chitty*, for the plaintiff.

Cur. adv. vult.

1887. March 21. LORD ESHER, M.R. This is an action to enforce a claim arising out of the decision of a parliamentary committee of the House of Commons on a private bill. The bill

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and the petition against it were before the committee, who decided that the two defendants were to pay the costs of the promoter on the ground that he had been vexatiously subjected to expense in the promotion of the bill by the opposition of the defendants. Judgment has been signed for the certified costs, and the Divisional Court has refused to set aside that judgment. Against that decision this appeal is brought.

Before the judgment was signed the case came before this Court on the refusal of a Divisional Court to give the plaintiff liberty to sign judgment, and this Court had to consider how far they could interfere with such a decision of a parliamentary committee, and it was held that although the High Court of Justice could not sit in appeal on such a decision, yet when asked to enforce an order by the process of the Courts, a Divisional Court was entitled to inquire if the committee had jurisdiction. I expressed my opinion that the only plea could be one going to the jurisdiction, and that it was clear there was no power to review the decision of the committee either on the law or the facts. The judgment having been signed, the case went before a Divisional Court on the question whether the judgment should be set aside and the defendants allowed to defend. Before that Court the case was argued on the question of jurisdiction, and it was said that there was a question of fact and also one of law. The first was whether the defendants were in fact petitioners, and the other whether, if so, they were such petitioners as are named in the Act? I think it must be true to say that if the committee had no jurisdiction the Court should not enforce the order—for instance, if the parties named in it were not before the committee they were not petitioners, and no order could be made against them, so, if though before the committee, they were not petitioners. What is a petitioner? A man who of his own will has petitioned Parliament to do something in his favour. If he did it as agent of some one else he is not a petitioner, who in that case is the person for whom he is acting as agent. In this case the petition was put forward as that of the company, and in this way the persons who put it forward affected to act as agents. If they did it for their own purposes, intending to act for themselves alone and not for the company, and they retained the parliamentary agent to act for

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them in their individual capacities, are they in that case petitioners? There is nothing in the statute about petitioners who have signed. Take the case of a person who uses another person's signature to a petition, and so appears and opposes a bill. Could it be said he was not a petitioner, or is it to be said in such a case that there is no petitioner? To so hold would be a manifest injustice to the promoter. In this case the defendants have used the name of the company, and the question is whether there is evidence on which the committee could find that they were themselves petitioners. If the parties are present before the committee, and the question arises if they are really petitioners or only agents acting for some one else the committee must have jurisdiction to enter into a preliminary inquiry whether they are petitioners or not. To hold otherwise would be to permit a promoter to be vexed, yet to say that because the parties have committed a fraud as well there is no remedy by making them pay the costs. The question is, whether there was evidence on which it could be reasonably found that in fact the defendants were the petitioners. I think there was such evidence, but I go further than that, for I entirely agree with Mathew, J., and have not the slightest doubt that the committee were right. Under these circumstances I think the judgment of the Divisional Court was right, and that the appeal should be dismissed.

BOWEN, L.J. I think that this appeal should be allowed. There is no question here of reviewing the practice or procedure of parliamentary committees; but while this is so, we cannot treat the matter as one that is to be decided by our view of whether the defendants have behaved well or ill. The sole question is, whether the order against the defendants was one which it was within or without the jurisdiction of the committee to make. The Act entitles the committee when a bill is before it, in dealing with an opposition which turns out to be vexatious, to inflict costs on the petitioners. The statute clothes the committee with a power they would not otherwise have. The right to order the payment of costs is as much the creation of statute law in such cases as it is in the courts of law. In determining, therefore, any question of costs we cannot wander

outside the Act, and the only question is, whether the word "petitioners" as used in the Act is wide enough to cover the persons against whom the order was made in the present case. We are asked to deal with this question in two parts, and to take separately the logical inquiries whether the defendants were in fact petitioners, and next, whether they were petitioners within the meaning of the Act. I do not understand what meaning the former inquiry can have when the real one is that which is put secondly. Now that is a question of jurisdiction, and in such cases nothing is more common than to hear it said that the merits are the other way. That may be so, or it may not, but the discussion of the merits, except so far as it bears on the application of the statute to this particular case, is immaterial.

This being a question of jurisdiction, can the parliamentary committee give themselves jurisdiction by adjudicating wrongly that persons were petitioners within the meaning of the Act? We must look to the Act to determine this. In the Act there is a complete absence of all machinery for going behind the petition and inquiring as to its promoters. The committee have before them the established practice and procedure. It would be dangerous to hold that when a statute gives power to a committee to give costs against those who are petitioners they can determine that persons are petitioners who do not appear on any petition to be so. In my view only those persons are petitioners who are deemed to be such according to the established practice of Parliament for the time being. Two matters must have been known to all on the committee—the distinction between a company and its promoters; and that it was a corporate body that was petitioning, and that the individuals in question had no locus standi and could not have been petitioners. I quite feel that there might be cases in which the Court would decline to interfere to relieve persons of the consequences of their acts. For instance, if the committee had agreed with the assent of the persons interested that they should be treated as petitioners, or if persons had fraudulently misled the committee by pretending they were petitioners, and it may be in other cases, a Court of Equity or Law would possibly not interfere to enable the persons interested to escape from the result of their own acts, although it is not

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necessary to decide this point. Putting such cases aside, take the case of a person using the name of another, can he be treated for all purposes as a petitioner? It is said in this case that there was a wrongful use of the seal of the company: if there was not, then beyond all question the corporate body are the petitioners. If the user was wrongful possibly there has been a contempt which the House could punish, and possibly a breach of trust for which a Court of Equity could make the persons who committed it responsible, but that does not make them petitioners. It seems to me that the committee had no more power to treat these persons as petitioners than we should have in like case to treat them as plaintiffs. This view relieves me from considering whether there was fraud at the meeting at which the seal was affixed. It is a hardship that the plaintiff as corporator may have to pay part of the expense of opposing his own bill, but such a hardship arises equally whether the seal to the petition was rightly or wrongly attached, and arises from his being a member of a company with which he is in disagreement.

Now as to what the committee did. These persons were not the petitioners; the petition was under the seal of the company, and the committee had no power to look beyond the petition to see who were pulling the strings. I think, therefore, the order of the committee was ultrà vires and that judgment must be entered for the defendants.

FRY, L.J. In this case the plaintiff is suing under the provisions of s. 5 of the Act passed in 1865 for awarding costs in certain cases of private bills. When the case was last before us the question of jurisdiction was left open, but now it has come again before us on two questions: had the committee jurisdiction to find that the defendants were the petitioners? and did they do so? We are not called upon, nor are we seeking in any way to interfere with the practice and procedure of Parliament. The question before us is, what is the statutory jurisdiction as to costs conferred by the Act. This turns on what is the meaning of the word "petitioner." There has been no alteration as to this since the passing of the Act, and it appears to me that in 1865 the word "petitioner" had a definite and ascertained meaning: petitioners are persons who

properly subscribe a written petition and appear before the committee to support its prayer. No one could say in these courts that a solicitor who without authority used the name of any person as plaintiff in an action was himself the plaintiff, though he might, under some circumstances, be made responsible for costs. I cannot help feeling confident that if it had been the intention of the legislature to arm a committee with power to inquire whether some person behind the nominal petitioner was the person actually responsible for the opposition they would have expressly conferred on committees power to deal with that matter, and to call the parties before them on that issue as being distinct from the other questions before them. There is this further observation to be made, that at the end of clause 2 occurs this proviso: "Provided always, that no landowner who bonâ fide at his own sole risk and charge opposes a Bill which proposes to take any portion of the said petitioner's property for the purposes of the Bill shall be liable to any costs in respect of his opposition to such Bill." This appears to me to be aimed at the case of a landowner lending his name to some rival company to enable them to oppose; and it declares in effect that in such case the landowner is properly described as the petitioner. That confirms the opinion that I entertain that the petitioner is the person who appears by the petition to be such. I think, therefore, that the committee had no jurisdiction to find that the defendants were the true petitioners. I need not go into the second inquiry whether they have so found; and, for the reasons I have given, I think the appeal must be allowed.

Appeal allowed; judgment entered for the defendants.

Solicitors for plaintiff: *Torr & Co., for Travell & Woodward, Nottingham.*

Solicitor for defendant: *W. Whitfield.*

A. M.

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Feb. 7, 8, 9, 10, 11;
March 14.

[IN THE COURT OF APPEAL.]

LYELL *v.* KENNEDY.

Limitations, Statute of—Action to recover Land—Possession of Tenants—Receipt of Rents by Agent—Ratification—3 & 4 Wm. 4, c. 27, ss. 8, 34—37 & 38 Vict. c. 57, s. 1.

By 3 & 4 Wm. 4, c. 27, s. 8, "When any person shall be in possession of any land as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to bring an action to recover such land shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

In an action to recover land by the plaintiff as assignee of the co-heiresses of D., the owner in fee of the land, who died intestate, it appeared that after D.'s death the defendant, who had previously acted as her agent and bailiff, continued to receive the rents of the land, which he paid into a bank, stating that he was acting on behalf of the true heir-at-law, and that he was ready to account to the heir-at-law when ascertained. It did not appear that these statements were ever communicated to the co-heiresses, or that the plaintiff in any way acted on the faith of them:—

Held, by the Court of Appeal, reversing the decision of Stephen, J., that the co-heiresses could not be taken to have been "in possession" of the land through the tenants so as to prevent the statute running from the end of the first year or other period of the tenancy.

By 3 & 4 Wm. 4, c. 27, s. 34, "At the determination of the period limited by this Act for making an entry or distress, or bringing an action, the right and title to the land for the recovery whereof an entry, distress, or action might have been made or brought within such period shall be extinguished":—

Held, by the Court of Appeal, reversing the decision of Stephen, J., first, that it was not shewn that the defendant in receiving the rents had acted in the name of the co-heiresses or the rightful owner of the land; secondly, that in any case it was not competent for the co-heiresses after the expiration of the statutory period to ratify the acts of the defendant so as to make his receipt of the rents their receipt.

ACTION (commenced January 4, 1881), to recover hereditaments near Manchester and mesne profits.

The statement of claim alleged that the plaintiff was assignee by deed of the co-heiresses of Ann Duncan, deceased, intestate, the owner in fee simple of the hereditaments, and that the defendant had admitted that his possession was only as agent, receiver, and trustee of Ann Duncan and her heirs; that the defendant was,

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and since Ann Duncan's death had been, in possession of the hereditaments as agent, bailiff, receiver, and trustee for the plaintiff; that certain of the tenants had attorned to him; and that he was wrongfully appropriating the rents to his own use. The plaintiff claimed a declaration that the defendant was a trustee of the property for Ann Duncan, her heirs and assigns, and that the plaintiff was, and since the year 1880 had been, entitled thereto; that the defendant might be ordered to give the plaintiff possession; and for a receiver and account of rents received by the defendant.

The defence denied the material allegations in the statement of claim, and pleaded the Statute of Limitations.

At the trial before Stephen, J., without a jury, it appeared that the plaintiff claimed as assignee of three sisters—E. Bradock, a widow (her husband having died in 1877), and C. and J. Cunningham, who were never married. These three sisters were alleged to be the co-heiresses of Ann Duncan, who died intestate November 5, 1867, and who was entitled to the property in question as devisee of Lawrence Buchan. At the time of her death the land was in the possession, as to part, of a tenant from year to year, and as to the rest, of tenants from week to week, and without any lease in writing. By deed dated December 24, 1880, the three sisters conveyed to the plaintiff in fee their interest in the property, and assigned to him all the rents and profits accrued since the death of Ann Duncan. Ann Duncan had employed the defendant, who was one of the executors of Lawrence Buchan, to manage the property on her behalf, and he received the rents during her life, and carried them to an account which he had opened in a bank in the name of "the executors of Lawrence Buchan." After Ann Duncan's death the defendant continued to receive the rents, of which he kept regular accounts. He gave receipts for the rent in the name of the "executors of Lawrence Buchan," and carried the rent to the same banking account, also in the name of the executors. It further appeared that he had stated repeatedly, orally and in writing, to the plaintiff (before he acquired the title of the co-heiresses) and other persons, that he was acting on behalf of the true heir-at-law, whoever he might be; and that he was ready to account to the heir when ascertained, and he stated by letter to the plaintiff that the property would be delivered to the rightful owners as soon as

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it could be ascertained who they were. It was not shewn that these statements of the defendant were ever communicated to the co-heiresses, or that the plaintiff in any way acted on the faith of them. In 1879 certain persons claiming to be the heirs of Ann Duncan brought actions to recover the property, and in the course of such proceedings advertisements were issued inviting those who claimed to be heirs to come forward and substantiate their claims.

The defendant, in the course of his evidence, stated that shortly before the death of Miss Duncan she told him that she had made a will by which she had left him her property at Manchester, and that he believed she had done so, though no will made by her disposing of this property had been found.

Sir C. Russell, A.G., A. T. Lawrence, and *McClymont,* for the plaintiff.

Gully, Q.C., Smyly, and *O. Leigh Clare,* for the defendant.

Cur. adv. vult.

June 22, 1886. STEPHEN, J., delivered judgment as follows. Upon the whole I hold that the plaintiff has proved that the three coparceners through whom he claims were the co-heiresses of Miss Ann Duncan. The only remaining question is, whether the plaintiff is barred by the operation of the Statutes of Limitation, or any of them. The plaintiff contended that upon the pleadings the action was for money had and received and for an account, and that the defendant, having placed himself in a fiduciary position, was bound, notwithstanding the Statute of Limitations, to render such an account.

Mr. Gully, for the defendant, argued that the action was really brought for the recovery of land and for mesne profits, and that it was barred by the Statute of Limitations.

As to the pleadings and the nature of the action itself the question appears to me to have been decided by authority. The case has upon these pleadings been before both the Court of Appeal and the House of Lords, and each has expressed its view upon the subject. The question before them was as to the extent of the plaintiff's right to interrogate the defendant. The Court of Appeal (1) held that the plaintiff could not administer the

(1) 20 Ch. D. 484.

interrogatories he wished to administer, because, in the words of Jessel, M.R., "this is simply an action to recover land and mesne profits by a legal title." Lord Esher, the present Master of the Rolls, said: "In my opinion it is clear that this action is an action for the recovery of possession of land." Taking that view of the pleadings, they disallowed a number of interrogatories which they considered inadmissible in such an action. On appeal to the House of Lords this judgment was reversed (1) not upon the ground that the action was not in substance an action of ejectment and for mesne profits, but upon the ground that the plaintiff in such an action is entitled to discovery. I think, therefore, that I am bound to regard the action as one for the recovery of land and of mesne profits.

The case, therefore (unless there is anything in the statute to prevent it), falls under 37 & 38 Vict. c. 57, s. 1, which provides that "no person shall bring an action to recover any land but within twelve years next after the time at which the right to bring such action shall have first accrued to some person through whom he claims." I do not think that either s. 25 or s. 26 of 3 & 4 Wm. 4, c. 27, applies to the case. The property is not vested in the defendant upon any express trust, so as to bring s. 25 into operation; nor do I see any evidence of a concealed fraud, such as is mentioned in s. 26; nor has any written acknowledgment of the plaintiff's title signed by the defendant or his agent ever been given so as to bring the case within s. 14. Mr. Gully argued, and, in my opinion, correctly, that the operation of the statute is to disable the plaintiff from suing, not to give any property to the defendant, and his inference that, if the case is regarded as an action for the recovery of land, the statute, as far as its own contents go, applies to two-thirds of the plaintiff's claim, appears to me to be correct.

If this concluded the matter the result would be that there must be judgment for the plaintiff for so much of the property as he claims through Mrs. Bradock, and for an account of the receipts attributable to her share of one-third from the death of Miss Duncan to judgment. This, however, does not conclude the case. It was argued, in the first place, that my Brother Denman's decision in *Kennedy* v. *Lyell* (2) was in favour of the

(1) 8 App. Cas. 217. (2) 15 Q. B. D. 491.

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plaintiff in the present case. His decision was, that in the particular circumstances of the case, the possession of the tenants became the possession of the heirs of Miss Duncan on her death, and that it was impossible to point to any particular time at which the statute began to run in favour of the defendants, at all events before the date of the coparceners' deed in 1880. This judgment he founded on a view of the case of *Bushby* v. *Dixon* (1), which was contested by Mr. Gully, who seemed to think that my Brother Denman's judgment was based on the doctrine of possessio fratris which the statute has done away with. I do not so understand it. This question seems to me to depend upon the view to be taken of the defendant's behaviour, which raises the same question in another form. It was argued for the plaintiff that the defendant was outside the statute, inasmuch as he had assumed a fiduciary character by acting as agent for the heir. I think my Brother Denman's view of *Bushby* v. *Dixon* (1) is, in substance, that the heir did on the death of Miss Duncan become possessed through the tenants of the land and houses in question, and that he continued to be so possessed until rent was paid to some one; but that, if the defendant received it only as agent for the heir, so long as he continued so to receive it, the heir was not dispossessed within the meaning of the 1st clause of the 3rd section of 3 & 4 Wm. 4, c. 27, and this view appears to me correct.

The conduct subsequent to Miss Duncan's death which was relied upon by the plaintiff as making the defendant a trustee for him of the rents he had received, consisted partly of acts done and partly of statements made in writing or verbally by the defendant. I do not think it necessary to go through every instance on either side, but I will mention those which appear to me to be the strongest cases of each.

[The learned judge referred to the form in which the defendant kept the banking account, and gave the receipts for the rents of the property, and to statements made by him; to a letter written by him to the plaintiff on January 15, 1869, in which he said, "I can assure you that, if you are Miss Duncan's heir, you will have no difficulty with me"; another letter by the defendant to the plaintiff on January 18, 1869, in which he said, "the property will be given up to the rightful owners as soon as it can be satis-

(1) 3 B. & C. 298.

factorily ascertained who they are"; a letter, on April 16, 1872, to another claimant of the property, in which the defendant said, "I am acting for the heir-at-law, whoever he may be"; and other similar statements.]

The main question in this case arises upon the facts I have mentioned, and it may in a few words be stated as follows: Has the defendant assumed a fiduciary relation to the heir, whoever he may be, or has he simply taken the rents for so long a time that he cannot now be called upon to account for them? The substance of the argument for the plaintiff is that the defendant's declarations, as interpreted by his conduct, shew that he originally received the rents as agent for the heir, whoever he might be, and that, though a man cannot make himself agent for another, he may so act as to enable that other to ratify his conduct and accept him as his agent, and that the plaintiff is on this ground entitled to adopt the defendant's interference with his property, and to require an account from him. The actual adoption consists in the claim now made. The contention for the defendant is, that his conduct has, as indeed it could have, no such legal effect. No man, it was said, can create a fiduciary relation between himself and another by simply telling him, or telling strangers, that he stands in such a relation.

In order to determine the legal relation between the parties we must look to the defendant's acts, and what he actually did in 1867 on Miss Duncan's death was by the reception of rents to take possession of the property; he did this not as a trustee, but of his own authority, and as regards two-thirds of it is now too late to bring any action against him. As regards one-third, Mr. Gully admitted that the question was one of pedigree only, and that if Mrs. Bradock was held to be one of the co-heiresses of Miss Duncan, she and, therefore, her assignee, was entitled to recover to that extent.

The point which I have to decide is which of these views is correct. The conclusion of fact to which I have been led by all the evidence on both sides, and especially by that of the defendant given before me, is that the defendant originally took possession of the property in order to take care of it for the heir-at-law of Miss Duncan, whoever he might be, but also hoping, and

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more or less believing, that a will might be discovered which would confer the property upon him. He managed everything after Miss Duncan's death as he had done during her lifetime, and kept all the accounts as before, in order that if anybody succeeded in proving his rights he might be in a position to deliver the property up to him. As time passed on, and different claims failed, he came by degrees to reflect that he might become entitled to the property by the operation of the Statute of Limitations, and it is probable that any reluctance he may have felt to set up such a claim was diminished by the belief, which he says he still entertains, that Miss Duncan did, in fact, leave him the property. When pressed by the Attorney-General as to the time when he determined to claim under the statute, he said, naturally, that he could not mention any precise moment, that his intention to do so was formed by degrees. Upon the moral character of this conduct I shall say nothing at all; it is not my duty to say anything. What I have to consider is its legal effect. The first question to be considered is whether it is a legal possibility that a man should take possession of real property, so far as the receipt of rent constitutes taking possession, in such a way as to make himself agent or trustee for, or to put himself in a fiduciary position towards, the heir-at-law or the person otherwise interested, be he who he might?

I was referred to a great number of cases on the subject, none of which appeared to me to be directly in point. Several cases were cited in which it has been held that a man might make himself agent by wrong to a defined known person, or to the unknown and even non-existent personal representative of a deceased person, but I do not think the cases go beyond this. If, however, the matter is regarded as one of principle, I do not see why such a relation should be legally impossible. There is one position well known to and recognised by the law which has the closest analogy to the position of the defendant in this case; it is the position of an executor de son tort. A man who takes possession of and deals with the personal property of another certainly assumes a fiduciary position towards the next of kin and other persons interested in the personal property of the deceased, and he might be made to account for his receipts and expenses

by the person interested. I do not see why in the nature of things a man might not put himself in a similar position with regard to real property, though the circumstances which would suggest such a course must be extremely rare. If such a thing is a legal possibility, which I think it is, I feel no hesitation in saying that such a position was, in fact, assumed by the defendant in this case, and, if it was so assumed, I think the Statute of Limitations does not apply. The co-heiresses came into possession on the death of Miss Duncan, and they were not dispossessed by the defendant's reception of the rents, as he made himself their agent, and continued to act in that character, at all events for much more than two years, which would bring it within the statute. As to the question of fact, there are only three ways of explaining the defendant's conduct. He may have entered as a mere wrongdoer, taking advantage of his relation towards Miss Duncan, and, in plain words, seizing an opportunity which presented itself of plundering her heir. Such conduct would morally be that of a thief, but no doubt it would give any one wicked enough to adopt such a course the benefit of the Statute of Limitations. I wholly acquit the defendant of any such disgraceful conduct. To impute it to him would be to forget all the circumstances of his conduct and to contradict every statement made by him, in writing, in pleading, in the Scotch action, and in conversation, to say nothing of the way in which he kept the accounts. A second course would have been to say, "I cannot produce Miss Duncan's will, but I know she left me this property. I assert my own ownership, and I defy any one to turn me out." Such conduct as this, successfully persisted in, would have been ultimately sheltered by the statute, but the defendant did not adopt it. If he had done so it is probable that the tenants of the mill and cottages would have held against him on their own account. The third course of conduct was that of receiving the rents as agent for the heir, and this, I think, is the one which he actually pursued. The whole of the evidence proves it. I think, moreover, that, even if he wavered in his intention and yielded, more or less, to the temptation of turning to his own advantage conduct which originally was not only innocent but laudable, he cannot be permitted now to explain away what he did, or to alter

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the relation to the heir in which he voluntarily placed himself. In the case of *In re Hallett* (1) in which the law relating to fiduciary relations is fully explained by the late Sir George Jessel, a principle is stated which appears to me precisely to cover this case. He said (p. 727): "Where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and, in fact, done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease, believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law."

The result is, that I give judgment for the plaintiff with costs, and direct an account of all moneys received from the property by the defendant since the death of Miss Duncan.

The defendant appealed.

1887. Feb. 7, 8, 9, 10, 11. *Sir H. Davey, Q.C.*, and *Gully, Q.C.* (*Smyly*, with them), for the defendant. This is, in substance an action of ejectment. The right of the plaintiff to recover on the title of the coparceners is barred as to two-thirds of the property by the operation of the Statutes of Limitation, 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57; as regards the share of Mrs. Bradock, it is admitted that her coverture prevents those statutes from running in favour of the defendant. By s. 1 of the Act of 1874 the action must be brought within twelve years after the right to bring it first accrued, and s. 9 incorporates 3 & 4 Will. 4, c. 27, which provides in s. 3 that the right to recover any land or rent shall, if the claimant claims the estate or interest of some deceased person who has been in receipt up to his death, be

(1) 13 Ch. D. 696.

deemed to have first accrued at the time of his death. The right of the coparceners accrued at Ann Duncan's death in 1867, and the action should have been brought within twelve years of that date. *Nepean* v. *Doe* (1) decides that the old doctrine of non-adverse possession is abolished, and that the only question is whether the action is brought within the time limited, or, if not so brought, whether it is within the statutory exceptions. The first exception is a written acknowledgment of the title of the person entitled, which by s. 14 of the Act 3 & 4 Will. 4, c. 27, must be given to him in writing signed by the person in possession or in receipt of the rent. In the present case Stephen, J., has applied the provisions of the section to acknowledgments of a totally different character. To satisfy the section, the acknowledgment must be given to the person really entitled or his agent, that is, to the coparceners or their agent, and further it must have been an acknowledgment of the title of the coparceners, and of the fact that the person to whom it was given fulfilled the description of heir-at-law of Ann Duncan. An acknowledgment after the expiration of the statutory period is of no avail; for the effect of the statute is to extinguish the right, not merely to bar the remedy: *Sanders* v. *Sanders*. (2) There is admittedly no express trust, so as to bring the case within s. 25 of the Act; the only other exception is under s. 26 in the case of concealed fraud, and Stephen, J., has found that there was none. The plaintiff not having brought himself within any of the exceptions, his right is extinguished by virtue of s. 34. *Bushby* v. *Dixon* (3) was decided before 3 & 4 Will. 4, c. 27, and the ground of the decision was that the person who received the rents was not in law a disseisor.

Apart from the question of the Statute of Limitations it is argued that the receipt of rents and profits by the defendant was not his own receipt, but that the coparceners were in receipt of them through the defendant as their agent. But the letters and declarations of the defendant only amount to a statement of the undoubted fact that, if the heir-at-law came and established his title, the defendant would have to account to him for the rents,

(1) 2 M. & W. 894. (2) 19 Ch. D. 373.

(3) 3 B. & C. 298.

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and was prepared to do so. His own declarations cannot make him an agent unless they were ratified, and there was no ratification within the twelve years. A mere assumption of agency, unless it has altered the position of the parties, may be retracted before ratification.

[FRY, L.J.:—Assume that for twelve years the defendant had given the receipts for rent to the tenants in the names of the coparceners.]

That would only operate to create an estoppel as between the defendant and the tenants. To hold that the coparceners were in receipt of the rents by the defendant as their agent, would be to introduce again the old doctrine of non-adverse possession. At the most the defendant's conduct only amounts to an offer by him to be agent to the heir-at-law, subject to the latter establishing his title; but agency is a contract, and no contract of agency was ever made by him prior to the time when the coparceners' rights were extinguished.

Sir C. Russell, Q.C., and *A. T. Lawrence*, for the plaintiff. This is not merely an action of ejectment; such an action must be brought against the persons in possession of the land, and, if it had been so brought, the defendant, who is not the landlord, could not have been let in to defend. The claim is for a declaration of right, and it involves the right of the plaintiff as assignee from the coparceners of the rents accrued due. The defendant is treated as a mere bailiff who declines to give up possession of the land.

The Statute of Limitations does not apply, because on the death intestate of a person seised of land which is in the occupation of tenants the possession of the tenants becomes the possession of the heir: *Bushby* v. *Dixon* (1); *Tuthill* v. *Rogers* (2). The onus is on the defendant to shew that the tenancies which existed at the death of Miss *Duncan* were determined. There is no evidence to shew that they were, at any rate till within twelve years before the commencement of the action, and consequently the heirs must be treated as having been in possession until within that time. The mere payment of rent to a stranger, independently of the capacity in which he purports to receive it,

(1) 3 B. & C. 298. (2) 1 J. & Lat. 36, 76.

cannot oust the possession of the true owner. If it could, s. 9 of the Act 3 & 4 Wm. 4, c. 27, which provides that the payment of rent to a person who is not entitled shall not dispossess the true owner, unless it is paid by virtue of a lease in writing made by a person who claims to be entitled to the land, would have been unnecessary. The payment of rent by the tenants to the defendant has not taken away the right of the heirs: Shelford's Real Property Statutes, 8th ed., p. 176; Watkins on Descents, 4th ed., pp. 56, 113.

Under the old law payment of rent to a stranger was not dispossession: *Doe* v. *Danvers* (1); and there could be no discontinuance without a voluntary abandonment of possession: Shelford's Real Property Statutes, 8th ed., p. 228. The mere remaining quiescent, your tenant being in possession, is not discontinuance. In the present case the heirs never gave any authority for the tenants to cease to be their tenants, and did not even know that they had paid rent to any other person. The statute runs only from the time when rent is first paid to a person who claims to receive it under a wrongful title: *Shaw* v. *Keighron* (2); *Chadwick* v. *Broadwood.* (3) Again, the statute has not run, because the defendant was in receipt of the rents as agent or trustee for the heirs, whoever they might be. So far, at any rate, as regards the rents which accrued while the twelve years were running, the statute does not apply. In the 2nd and 3rd sections of the Act the word "rent" means a rent-charge, and does not apply to rent on a demise: *Doe* v. *Angell.* (4) The question is, when did the right to make an entry or recover the land first accrue to the plaintiff or his predecessor in title. There has never been anything which could be called a tortious receipt of rents by the defendant. If he had been affecting to receive them in his own right, the case might possibly have been different; but in substance he assumed the character of the bailiff or agent of the true owners, and, till he disclaimed that character, there could not be anything in the nature of an ouster of the owners: *Smith* v. *Bennett.* (5)

If the receipt of the rents were equivalent to possession, the

(1) 7 East, 299, 321.
(2) 3 Ir. Rep. Eq. 574.
(3) 3 Beav. 308.
(4) 9 Q. B. 328, 355.
(5) 30 L. T. (N.S.) 100.

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defendant, having assumed to be in possession of the land in a fiduciary character, cannot now repudiate that character and assert that he received the rents on his own account: *Stone* v. *Godfrey*. (1) Sects. 7, 8, and 9 of the Act 3 & 4 Wm. 4, c. 27, deal with the case of land subject to a tenancy, and, under those sections, in order that the receipt of rent by a stranger should amount to an ouster of the possession of the true owner, it must, at any rate, be a tortious receipt of rent under circumstances amounting to a claim of right by the stranger. A man cannot affect to receive the rents in a fiduciary capacity in right of the true owner, and then turn round and assert that he received them tortiously. In such a case he is estopped, and bound to account to the true owners. It is clear that the defendant did not affect to collect the rents in his own right, but in some way or other as representing other persons entitled to them, that is to say, either as agent or trustee. The receipts were given as for the "executors of Buchan," which meant, and must have been taken to mean, the true owner in succession to Buchan. The receipts were given in that form in the lifetime of Ann Duncan, and must then have had that meaning, because the executors as such had nothing to do with the land. The meaning must have been, that he was receiving the rent as agent, and, if so, it could only have been as agent for the heirs-at-law.

The acts of a person who assumes to be acting as agent for another can be ratified afterwards by the principal, even though he was unknown at the time, and in the present case the bringing of the action was a sufficient ratification by the plaintiff: Story on Agency, 9th ed., §§ 242, 248; *Foster* v. *Bates* (2); *Hull* v. *Pickersgill* (3); Year Book, 7 Hen. 4, 34, pl. 1; *Hagedorn* v. *Oliverson* (4); *Watson* v. *Swann* (5); *Hitchings* v. *Thompson* (6); *Bird* v. *Brown*. (7) The rule as suggested in *Matheson* v. *Kilburn* (8) goes too far, viz., that the agent must assume to be acting "on behalf of another person." It is not necessary that he should assume to act in the name of another or for another; it is

(1) 5 D. M. & G. 76.
(2) 12 M. & W. 226.
(3) 1 B. & B. 282.
(4) 2 M. & S. 485.
(5) 11 C. B. (N.S.) 756.
(6) 5 Ex. 50.
(7) 4 Ex. 786.
(8) Sm. L. C., 8th ed., vol. i. 382.

sufficient if he intends to act for the use or benefit of another. In *Wilson* v. *Barker* (1) Parke, J., said (p. 616), "unless you could prove here that the seizure of the gun was to Barker's use, he cannot be made liable in trespass." *Wilson* v. *Tumman* (2) is distinguishable. There an execution was levied under a process which turned out to be invalid. The sheriff in levying was not acting under the direction of the defendant or for his use; he was acting under the process of the Court on behalf of the law, and therefore the defendant could not by reason of a subsequent ratification be made liable in trespass. That is a totally different case from the present. The declaration made by the defendant with regard to the capacity in which he collected the rents amount to a declaration that he collected them in a fiduciary capacity, and as trustee for the true owner; and, having admitted such to be the case, he is bound by that admission: *Dillon* v. *Parker* (3); and cannot now allege that he was collecting them tortiously, and the Statute of Limitations will be no bar to plaintiff's claim for an account. Again, the defendant's connection with the property having been acquired in a confidential and fiduciary character in Ann Duncan's lifetime, he cannot avail himself of the connection so acquired to obtain the property for himself: *Williams* v. *Pott* (4); *Lyell* v. *Kennedy* (5); *In re Fitzgerald* (6); *Beer* v. *Ward* (7); *Burdick* v. *Garrick* (8); *Ormond* v. *Hutchinson* (9); *Jones* v. *Lock* (10); *Tate* v. *Leithead* (11); *Stone* v. *Godfrey.* (12)

Sir H. Davey, Q.C., in reply. The plaintiff is bound to shew that the relation of principal and agent existed between the unknown heirs and the defendant, and this he has not done.

As to the ratification, it has not been shewn that there was any until after the twelve years had run; and after the right has once been extinguished by the lapse of time, no acknowledgment, not even one under seal, can revive it: *Lord Audley* v. *Pollard* (13); *Bird* v. *Brown* (14); Story on Agency, 9th ed., § 239.

(1) 4 B. & Ad. 614.
(2) 6 Man. & G. 236.
(3) Jac. 505.
(4) Law Rep. 12 Eq. 149.
(5) 8 App. Cas. 217.
(6) 2 Sch. & Lef. 431.
(7) Jac. 194.
(8) Law Rep. 5 Ch. 233.
(9) 13 Ves. 47.
(10) Law Rep. 1 Ch. 25.
(11) Kay, 658.
(12) 5 D. M. & G. 76.
(13) Cro. Eliz. 561.
(14) 4 Ex. 786.

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The plaintiff must really rely on the statutory period never having run, by reason of the defendant having been in receipt of the rents in a fiduciary capacity as agent or trustee. But the relation of principal and agent cannot be constituted without the consent of the principal. If the defendant demanded the rent in the name of the executors, the inference would be that he was not acting for the heirs. At any rate there is nothing more than evidence that the defendant intended to act for the heirs, for a man cannot make himself an agent by declaring that he is such, unless his agency is ratified and accepted by the principal. The act must have been done on behalf of the principal, who is supposed afterwards to ratify it: *Wilson* v. *Tumman* (1); *Watson* v. *Swann*. (2)

Then it is said that the statute never commenced to run, because the heirs were in possession, the possession of the tenants being their possession. That cannot be. Physical possession may not be necessary, but the receipt of rent paid by a tenant is the receipt of "profits" quite as much as the receipt of the crops would be. If the expression "receipt of profits" is to be limited to the profitable use of land by the owner himself, what is the difference between that and "possession"? Primâ facie the time would begin to run from the death of Miss Duncan; it is for the plaintiff to shew that it did not begin then. At any rate, s. 8 of the Act 3 & 4 Wm. 4, c. 27, applies, and the time began to run from the determination of the first period after Miss Duncan's death of the then existing tenancies.

Mar. 14. FRY, L.J., read the written judgment of the Court (Lord Esher, M.R., and Bowen and Fry, L.JJ.). Of the numerous questions raised in the argument before us, two only remain to be disposed of; the one with regard to the evidence of the title of the co-heiresses under whom the plaintiff claims, the other as to the Statute of Limitations.

It was argued that Stephen, J., was in error in considering that the plaintiff had made out a primâ facie case for the co-heiresses under whom he claims, by reason of his not having exhausted certain earlier lines. It was not, indeed, contended that there

(1) 6 M. & G. 236. (2) 11 C. B. (N.S.) 756, 771.

was no evidence, but it was argued that the evidence was so slight that it ought not to be acted on. We are of opinion that the non-claim by any person making title through these elder branches, especially after the publicity which has been given to the affairs of Miss Duncan by the various litigations which have ensued on her death relative to her affairs, and the advertisements which have been issued in the course of these suits, is evidence that there are no heirs nearer than the Cunninghams, and that Stephen, J., was not wrong in acting on such evidence. In this conclusion we are confirmed by *Greaves* v. *Greenwood.* (1)

The main question in controversy arises in reference to the defence of the Statute of Limitations set up by the defendant.

It is admitted on behalf of the defendant that, with regard to the one third of the estate derived by the plaintiff from Mrs. Bradock, there is, in consequence of her coverture, no defence on the Statute of Limitations, and this defence, therefore, is confined to two-thirds of the estate.

Two questions arise with reference to the Statute of Limitations. First, assuming the defendant to have been in receipt of the rents for his own benefit, had the statute extinguished the rights of the plaintiff in the two-thirds in question at the date of the writ, and so barred the action? Secondly, was the defendant in receipt of the rents for his own benefit, or as agent or trustee for the coparceners and the plaintiff, so as to make his receipt their receipt. Some embarrassment in respect of the first of these questions has arisen from the peculiar character of the statement of claim in this action. It alleged the defendant to have been in possession since Miss Duncan's death, and at the same time it alleged that certain tenants of the property had attorned to him. The plaintiff, whilst alleging the legal title to be in himself, prays that the defendant may be declared a trustee of the premises for Miss Duncan, her heirs and assigns, and that he should give to the plaintiff possession of the premises. An ejectment action in which the plaintiff asserts the legal right to possession to be in himself, and claims possession on that ground, is a most familiar form of action, and an action in which the plaintiff asserts the legal title to be in the defendant and some

(1) 2 Ex. D. 289.

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equitable title to be in himself, and seeks for relief on that ground, is also a well-known form of action. But the statement of claim in the present case appears to us to halt between two opinions, and whilst asserting a legal title to be in the plaintiff, tries to raise an equity against the defendant, and asks for delivery of possession by the defendant, while at the same time it asserts that the defendant is not in actual possession. We think, however, that it is plain that the action is one for the recovery of land, and that it must be tried as regards the question of the Statute of Limitations as if it had been originally brought against the persons actually in possession, and as if the defendant had been allowed to come in and defend. The 8th section of the Statute of Limitations (3 & 4 Wm. 4, c. 27) appears to us to apply to the circumstances of this case. It provides, so far as relates to the present case, that "when any person shall be in possession of any land, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to bring an action to recover such land, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen." The land in question was, at the accruer of the coparceners' title, in the possession, as to part, of a tenant from year to year, and, as to the rest, of tenants from week to week, and without any lease in writing. On the assumption on which we are now considering the case—viz., that the defendant was in receipt of the rents for his own benefit, no rent has been paid by the tenants to the persons entitled—i.e., the coparceners; their right to bring the action therefore accrued at the determination of the first year, or the first week, of the tenancies after Miss Duncan's death. As she died on November 5, 1867, it follows that the right of action must have accrued within the year ending November 5, 1868; and, as this action was not brought till January, 1881, it was brought more than twelve years after the accruer of that right. It was, however, argued that the case of *Bushby* v. *Dixon* (1) shews, that the possession of the tenant is the possession of the heir, and this contention appears to have weighed with the learned judge who tried this case.

(1) 3 B. & C. 298.

There is, perhaps, no legal conception more open to a variety of meanings than "possession." In the case cited the possession of the tenant is said to be the possession of the heir, so as to convert the legal seisin of the heir into a seisin in fact, and thereby to introduce the doctrine of possessio fratris. But it is obvious that, in the 8th section of the Statute of Limitations, the possession of the tenant is not the possession of the person entitled so as to prevent the statute running from the end of the first year or other period of the tenancy. No doctrine as to the imputation of the tenant's possession to the heir can affect the enactment, which defines with precision the date when the right of action is deemed to have accrued, and for this reason we are not able to agree in the inference which Stephen, J., drew from the case under discussion.

But it was, in the next place, contended that the defendant had acted as agent for the coparceners, and for the plaintiff, after he acquired their title, and that consequently the receipt of the rents of the land by the defendant was the receipt of the coparceners and of the plaintiff. It is, we think, made out by the evidence and admissions in this case that, at various times before the statutory period had expired, the defendant did state to various persons, including the plaintiff, before he had acquired the coparceners' title, that he was acting on behalf of the true heir, and that the property would be given up to the rightful owner when ascertained. But it is not shewn that these statements of the defendant were ever communicated to the coparceners, nor is it shewn that the plaintiff in any way acted on the faith of them: on the contrary, his letter of February 17, 1871, which was read in the course of the proceedings before us, shews that from a very early date he anticipated that the defendant would use every means in his power to retain the property in question. In our opinion it is not shewn that the defendant acted in the name of the coparceners, or of the true owner, or held himself out to the tenants, or to any other person with whom he had dealings in respect of the property, as acting for the coparceners; he appears to have gone on after the death of Miss Duncan in precisely the same manner as during her lifetime. He gave receipts for the rent in the name of the executors of Lawrence Buchan, and carried the rents to the same banking account also in the name of the executors. It was argued that the phrase "the executors of

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Lawrence Buchan" was an alias for "the co-heirs" or for "the true owner," but we cannot adopt that view, and we therefore think that the acts of the defendant in relation to this property were not so done by him as to enable the coparceners, or any of them, to adopt them as their own, and so to convert the defendant into their agent and to make him accountable accordingly.

But, furthermore, as regards the two Misses Cunningham and the plaintiff, no act of ratification can be shewn until the bringing of this action. In our judgment it was not competent for the plaintiff, after the expiration of the statutory period, to ratify the acts of the defendant, to make his receipt of rent the receipt of the plaintiff, and so as to give the plaintiff the land in question. This conclusion necessarily flows from the 34th section of the statute, which, at the determination of the statutory period, extinguishes the right and title of the person who might otherwise have brought an action. After that period a written acknowledgment by the person in possession, or a payment of rent by such person, will not restore the title which has been extinguished by the statute (*Sanders* v. *Sanders* (1)), and it would, in our opinion, be strange if a title could be restored by the adoption of an agency which could not be restored by a written acknowledgment. The case of *Lord Audley* v. *Pollard* (2), which shews that an entry by a stranger after a fine could not be adopted by the rightful claimant after the expiration of the five years, is an illustration of the same principle.

For these reasons we are of opinion that the plaintiff has no title to recover the two-thirds of the land which he derived under the two Misses Cunningham, and further, that it was not competent for him, as the assign of Mrs. Bradock, by this action to adopt the receipts of the defendant in respect of her third. The plaintiff is, therefore, entitled to judgment for the recovery of one-third of the land.

Appeal allowed.

Solicitor for plaintiff: *J. Balfour Allan.*

Solicitors for defendant: *Rooke & Sons, for Earle, Sons, & Co., Manchester.*

(1) 19 Ch. D. 373. (2) Cro. Eliz. 561.

W. L. C.

[IN THE COURT OF APPEAL.]

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May 10.

BARNETT, HOARES, & CO. *v.* THE SOUTH LONDON TRAMWAYS COMPANY.

Principal and Agent—Authority—Secretary of Company, Representation by.

The defendants, a tramway company, employed contractors to execute certain works. By the contract the defendants had a right to retain a certain percentage of the amounts for which their engineer from time to time certified on account of the price of the works, until after the completion of the same. The contractors applied to the plaintiffs for an advance upon the security of retention moneys under the contract. The defendants' secretary, in answer to inquiries made by the plaintiffs, erroneously represented to them that there was a certain amount of retention money in the defendants' hands which would be payable after the completion of the works, whereas in fact it was not so. The plaintiffs thereupon advanced money to the contractors on the security of an assignment of the retention money. There was no evidence to shew that the secretary had authority to make the representations which he had made:—

Held, that it was not within the scope of a secretary's authority to make such representations, and, therefore, in an action by the plaintiffs as assignees of the retention money, the defendants were not estopped from denying that such money was due.

APPEAL from the judgment of Field, J., at the trial. The action was brought by the plaintiffs as equitable assignees of certain retention moneys alleged to be due under a contract for the construction of a tramway. The facts were as follows:—

The defendants, a tramway company, had entered into a contract with Messrs. Green & Burleigh, contractors, for the construction by the latter of a portion of their line. By such contract the defendants had a right to retain a certain percentage of the amounts for which their engineer from time to time certified on account of the contract price of the works, until the expiration of a period of six months ending March 21, 1884, during which period the contractors were to maintain the line. The contractors during the progress of the works being in want of money applied to the plaintiffs, who were bankers, for an advance of 2000*l.*, and by way of security handed them a letter purporting to assign to them retention moneys under the contract to the amount of 2000*l.* The plaintiffs wrote to the defendants' secretary giving notice of the proposed transaction. The secretary wrote back

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saying: "We note that Messrs. Green & Burleigh have charged their retention moneys now in our hands to the amount of 2000*l.*, which we hold to your order payable on 21st March next." The plaintiffs wrote again to the defendants' secretary, acknowledging receipt of his letter, and saying: "May we assume that this sum of 2000*l.* is absolutely free from any existing or possible claims on the part of your company or any one else?" The secretary answered them, saying: "The moneys we hold of Messrs. Green & Burleigh represent retention moneys on contract, and, beyond the possible claim of the company upon the contractors to keep up their works for six months after the expiring of their contracts, there is no further charge on the same." The plaintiffs thereupon advanced 2000*l.* to Messrs. Green & Burleigh upon the security of the assignment of the retention moneys. On March 21, 1884, the plaintiffs, not having been paid by the contractors, demanded payment of the retention moneys assigned to them from the defendants. Except with regard to a balance of 675*l.*, which the defendants admitted to be due from them under the contract and had paid to the plaintiffs, the defendants denied their liability. It appeared that the statements of the secretary with regard to the existence of retention moneys in the hands of the defendants to a greater extent were made in error, the defendants having really paid to the contractors the rest of the money which they were entitled to retain. There was no evidence of any express authority given to the secretary to make such representations, nor as to the nature or scope of his employment or functions. The learned judge held that the secretary had no authority to make the representations, which were not, therefore, binding on the company, and the defendants were, therefore, not liable beyond the amount of the balance actually due from them to the contractors.

Charles, Q.C., for the plaintiffs. The defendants are estopped by the representations of their secretary from denying that there were and are retention moneys to the extent of 2000*l.* in their hands. It is part of the ordinary business of a company that such inquiries as were made by the plaintiffs should be addressed to it with relation to financial matters in which it is interested.

The proper person to whom they must necessarily be addressed on behalf of the company is its secretary. It is necessarily, therefore, within the scope of his employment as secretary to answer such inquiries.

[He cited *Swift* v. *Jewsbury* (1); *Barwick* v. *English Joint Stock Bank.* (2)]

Murphy, Q.C., and *Blake Odgers*, for the defendants, cited *Newlands* v. *National Employers' Accident Association* (3) and *Williams* v. *Chester and Holyhead Ry. Co.* (4)

They were not called on to argue.

LORD ESHER, M.R. The question in this case is whether, upon the mere fact that the person making these representations was the secretary of the company, and, in the absence of evidence of any express authority or of any course of business from which authority might be inferred, we ought to hold that the secretary was a person upon whose statements the plaintiffs were entitled to rely as having authority thereby to bind the defendants. I am content to give my judgment in the same terms as I employed in *Newlands* v. *National Employers' Accident Association.* (3) A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts. For these reasons I think the appeal must be dismissed.

FRY, L.J. I have come to the same conclusion. I see no reason why the secretary should be held to have had authority to make these representations so as to bind the company by way of estoppel. No evidence was given of the existence of such authority. It is suggested that the Court will take cognizance of the nature of the office of a secretary, and that such an authority is ordinarily incidental thereto. I do not think that is so.

(1) Law Rep. 9 Q. B. 301.
(2) Law Rep. 2 Ex. 259.
(3) 54 L. J. (Q.B.D.) 428.
(4) 15 Jur. 828.

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LOPES, L.J. In this case we are asked to infer from the mere fact that a person was the secretary of a tramway company that he had authority to make representations with regard to the financial situation and relations of the company, although there was no evidence whatever of any express authority nor any evidence that the making of such representations was within the scope of his duty. It seems to me that it would be most unreasonable to make the inference which we are asked to make.

Appeal dismissed.

Solicitors for plaintiffs: *Dawes & Sons.*
Solicitors for defendants: *Wilkins, Blyth & Dutton.*

E. L.

March 19; *May* 18.

[IN THE COURT OF APPEAL.]

PURSER, APPELLANT, *v.* THE LOCAL BOARD OF HEALTH FOR THE DISTRICT OF WORTHING, RESPONDENTS.

Local Government Acts—General District Rate—"Land used as market gardens or nursery grounds"—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 211, *sub-s.* 1 (*b*).

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (*b*), "the occupier of any land used as . . . . market gardens or nursery grounds . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof."

The appellant, a market gardener and nurseryman, was the occupier of a piece of land upon which were built sixteen greenhouses or glasshouses, which practically covered the surface of the land; they were built on brick foundations, and were used by the appellant for the purpose of growing fruit and vegetables for sale in the course of his business:—

Held, affirming the decision of the Queen's Bench Division, that the land with the greenhouses upon it constituted a market garden or nursery ground within the meaning of the Act, and that the appellant was liable to be rated to the general district rate in the proportion of one-fourth part only of the net annual value of the property.

THE appellant having appealed to the sessions against a rate made by the respondents, a case was stated under 12 & 13 Vict. c. 45, s. 11, which was in substance as follows.

The appellant was a grower of fruit, vegetables, and flowers at Worthing, and described himself and was commonly known as

a market gardener and nurseryman. He was the owner and occupier of a piece of land of about 1A. and 1R. in extent, on which sixteen glasshouses or greenhouses of various sizes were erected; the houses were used by the appellant for the purpose of growing tomatoes, cucumbers and grapes, and to a smaller extent other vegetables, for the purpose of sale. The plants and crops grown therein were watered and heated by artificial means, and grown upon soil placed upon prepared beds inside the houses, and matured much earlier than in the open ground. The roots of the vines were in prepared beds outside the houses and the stems were carried through apertures to the inside, eight of the houses being thus used for growing vines. The whole of the houses were, as appeared from the plans attached to the case, built upon dwarf brick walls like an ordinary greenhouse, and the whole of the land with the exception of an inconsiderable portion was covered with the houses.

On April 6, 1886, the respondents made a general district rate, to which the appellant was rated in respect of this piece of ground. In the rate the property was described as "greenhouses," and the appellant was rated at 74*l.* 10*s.*, the full rateable value as stated in the poor-rate. In the valuation list for the parish in which the piece of ground was situated, this property was described as so many superficial yards of glass and so many yards of pipe, the gross estimated rental being assessed at 114*l.* 10*s.*, and the rateable value at 74*l.* 10*s.* The appellant contended that he was liable to be rated to the general district rate in the proportion of one-fourth part only of the full net annual value of the property, on the ground that the land with the houses and buildings was "used as" a market garden or nursery ground within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875 (38 & 39 Vict. c. 55). (1) The respon-

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (*b*): "The owner of any tithes, or of any tithe commutation rent-charge, or the occupier of any land used as arable meadow or pasture ground only, or as woodlands, market gardens or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

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dents contended that the appellant was liable to be rated in respect of the greenhouses or glasshouses at their full net annual value of 74*l.* 10*s.* The question for the opinion of the Court was whether the contention of the appellant or that of the respondents was right.

Charles, Q.C., (*Forrest Fulton*, and *A. Glen*, with him), for the appellant. This ground is within the exemption. It is used for gardening operations, and is not the less a garden because it is covered with glass.

Lumley Smith, Q.C., (*English Harrison*, and *Bartley Denniss*, with him), for the respondents. This is a new and important trade, not in the nature of market gardening. The greenhouses all rest on brick walls, and are as much attached to the soil as a house is; they are ancillary to the use of the land, and are adjuncts to it, and are therefore rateable at the full net annual value. The exemption in s. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), in favour of land used only as a railway was held not to extend to the adjuncts, such as stations and warehouses, though necessary to its working: *South Wales Ry. Co.* v. *Swansea Local Board* (1); and under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 55, dock warehouses and other adjuncts to docks were on the same ground held rateable at the full annual value: *Newport Dock Co.* v. *Newport Local Board.* (2) In a similar case under 3 & 4 Wm. 4, c. 90, s. 33, Blackburn, J., says, "I think the distinction is between land, which is the general word, and land which has been built upon": *Reg.* v. *Midland Ry. Co.* (3). Adopting that distinction, this is land which has been built upon, and is rateable at its full net annual value.

[They also cited *Peto* v. *Overseers of West Ham* (4).]

Charles, Q.C., was not called upon to reply.

DAY, J. I cannot entertain a doubt that this ground is within the exemption created by the Act, and that it ought to be assessed at one-fourth of its net annual value; it is used for gardening, that is, for the production of fruit and vegetables on a more or

(1) 4 E. & B. 189.
(2) 2 B. & S. 708.
(3) Law Rep. 10 Q. B. 389, at p. 396.
(4) 2 E. & E. 144.

less small scale, as distinguished from agricultural use on a large scale; and in my judgment it is a market garden. It is very difficult to define the distinction in these cases; but this ground is clearly used, not as a farm, but for the growing of those products for which market gardens and nursery grounds are ordinarily used. It is said that it is not a market garden because the bulk of it is under glass; but I fail to see the distinction; in my opinion a garden is not the less a garden because it is effectually protected by glass against the weather or by high walls against the wind; and this particular ground is used as a garden for trade purposes and not merely, like a gentleman's garden, for pleasure. It is a garden whether it contains one greenhouse or twelve.

WILLS, J. I am of the same opinion. In arriving at our decision we should look at the state of things which was in existence when the Act was passed. There were then market gardens and nursery grounds all over the country, and in the majority of them a very large and substantial portion was covered by glasshouses. Gardening operations were carried on in them, and the cultivation of hothouse and greenhouse plants is no less essential a part of these operations than the cultivation of plants which grow in the open air. These are places where operations in the nature of gardening are carried on, and these houses are parts, and necessarily so, of them. I think that such pieces of ground are very properly included under the head of market gardens or nursery grounds. Modern life has increased the relative proportion in them of glass to ground uncovered; but I see no reason why the ground so occupied should not fall within the exemption.

Judgment for appellant.

W. J. B.

The Local Board appealed.

May 18. *Lumley Smith, Q.C.*, and *English Harrison*, for the appellants, argued as in the Court below.

A. Charles, Q.C. (*Forrest Fulton*, and *A. Glen*, with him), for the respondent, was not heard.

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LORD ESHER, M.R. I am of opinion that the judgment of the Queen's Bench Division must be affirmed upon the grounds stated by the learned judges. There can be no doubt that the respondent used the whole of this plot of land as a market garden—for the purpose of growing fruits and vegetables for sale. I think that the land is not the less used as a market garden because these glass houses have been placed upon it.

FRY, L.J., and LOPES, L.J., concurred.

Appeal dismissed.

Solicitor for appellants: *John Hands, for Verrall, Worthing.*
Solicitors for respondent: *Wolferstan & Avery.*

W. A.

March 22, 24.

THOMAS *v.* THE EXETER FLYING POST COMPANY, LIMITED.

Practice—Withdrawal of Juror—Breach of Terms of Agreement to withdraw—Jurisdiction to re-try Action.

The withdrawal of a juror upon terms is not necessarily the final determination of an action; and if there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the Court before whom the case came for trial has jurisdiction to re-try the action.

ACTION for libel published in a newspaper belonging to the defendants.

At the trial before Denman, J., at the Exeter Assizes, after the plaintiff's case had been opened, it was agreed that a juror should be withdrawn, that the defendants' counsel should offer an apology in court on his clients' behalf, and that an account of the proceedings including the apology made by counsel should be published in the defendants' paper. In accordance with this arrangement a juror was withdrawn, and an apology was made in court by the defendants' counsel. In the defendants' paper, which was published the same evening, there was a full account of the trial, including the apology tendered in court by counsel, but in another part of the same paper there appeared a leading article which not merely explained away the apology, but substantially repeated the libellous charges against the plaintiff in

language as strong as that of the original libel. The next morning notice was served on the defendants' solicitors of an application on the part of the plaintiff to the judge that the case might be reinstated in the cause list for the purpose of being re-tried, but the defendants' solicitors declined in any way to appear upon such application, alleging that by the withdrawal of a juror the action had come to an end. The judge made the order as asked for by the plaintiff. Upon the second trial, at which the defendants did not appear either personally or by counsel, the jury found a verdict for the plaintiff for 100*l.* damages, and the learned judge gave judgment for that amount and for the costs of both trials. The defendants then gave the plaintiff notice of motion that the verdict and judgment and all proceedings had and taken subsequent to the withdrawal of a juror upon the first trial be set aside, and that the terms agreed upon between the parties on the said trial should stand, and the costs of the second trial be paid by the plaintiff.

Charles, Q.C., and *E. U. Bullen*, for the defendants. The withdrawal of a juror by consent of the parties puts a final end to the litigation: Chitty's Archbold, p. 648 (14th ed.); *Gibbs* v. *Ralph*. (1) It is said in the present case that the withdrawal was upon terms that have not been complied with; but the only term was that the apology as made in court should be inserted in the defendants' paper, and this was done. The fresh libel was the subject of a fresh action, but was not a breach of any undertaking by the defendants. The plaintiff will rely on *Norburn* v. *Hilliam* (2); but in that case the withdrawal of the juror was only one of the terms of a definite arrangement, of which the defendant declined to perform his part, and in consequence of his so declining the position of the plaintiff was entirely altered. If the withdrawal of the juror does not finally determine the action, but amounts to a nonsuit upon terms, a new trial could only be granted by this Court, and not by the judge of assize.

Pitt Lewis, Q.C., and *Bernard Coleridge*, for the plaintiff. *Gibbs* v. *Ralph* (1) is not in point; there was in that case no want of

(1) 14 M. & W. 804. (2) Law Rep. 5 C. P. 129.

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good faith. The withdrawal of a juror is the same as the discharge of the jury by consent, and neither course puts an end to the action: *Everett* v. *Youells* (1), which case is cited with approval in *Harries* v. *Thomas*. (2) The cause still exists after the withdrawal of a juror, and can be tried, if necessity arises: *Thomas* v. *Lewis* (3); *Burdon* v. *Flower* (4), in which latter case Coleridge, J. says, "The parties having withdrawn a juror, it is the same as if no trial at all had taken place. Either the plaintiff or the defendant may go down to trial again." The plaintiff could not have moved for a new trial, for there had not been a trial at all. The breach of faith by the defendants relegates both parties to their original position.

Charles, Q.C., in reply. Neither *Thomas* v. *Lewis* (3), nor *Burdon* v. *Flower* (5), affects the rule of practice that the withdrawal of a juror (unless the agreement be entered into alio intuitu by one of the parties) puts an end to the action, and the language of Coleridge, J., in the latter case cannot be reconciled with the later authorities. It is impossible to put the parties again in the same position that they were in at the first trial; the same jury cannot hear the case.

DAY, J. In this case we are asked by the defendants to set aside the verdict and judgment, not on the ground of merits, for there are none, but on the ground that what was done by the learned judge was done without jurisdiction, and that the cause came to an end on the withdrawal of a juror. If the agreement to withdraw a juror had been obtained by fraud, the question of jurisdiction would not arise; but I am not prepared to go the length of holding that the owners of the paper at the time they instructed counsel to make the statement on their behalf had formed the deliberate intention of relieving themselves of the discredit of having to publish an apology by reviving the original imputations on the plaintiff. The doubts which I felt during the argument as to the effect of the agreement in the

(1) 3 B. & Ad. 349.
(2) 2 M. & W. 32.
(3) 5 Dowl. 395.
(4) 7 Dowl. 786, at p. 788.
(5) 7 Dowl. 786.

absence of fraud have been dispelled, and I am satisfied that the cause was not brought to an end by the withdrawal of a juror. It is true that cases may be found where detached expressions in the judgments seem to point to an opposite conclusion, but in construing the language of a judge care should be taken to see whether he is speaking with reference to the facts of the particular case or whether he is laying down a universal proposition of law. In one sense, the popular sense, it is true that the cause is at an end, for in ninety-nine cases out of a hundred it does not become necessary to take any further proceedings; but it is not the necessary consequence of the withdrawal of a juror, which amounts to a consent of the parties to dispense with the hearing and all further proceedings. If after such an agreement either of the parties sought to take any further step, the Court would restrain him; but it is technically incorrect to say that a legal end has been put to the cause. That being so, there is no reason why the case should not be tried, if circumstances arise to justify such a course. In the present case I think that my Brother Denman came to a sound conclusion that the agreement, whether or not it was fraudulent ab initio, had been grossly evaded by the defendants, and that in trying the case he made a very proper exercise of his jurisdiction.

WILLS, J. I am of the same opinion. No doubt most persons would say that the effect of withdrawing a juror was that the cause thereby came to an end; and popularly speaking that is a very fair description of the result of such an agreement; in all ordinary cases the juror is withdrawn with the intention that the cause shall, and it does, come to an end. *Gibbs* v. *Ralph* (1) is the only case where similar general language is used without qualification, and it is abundantly clear, both upon principle and from the decisions in *Burdon* v. *Flower* (2) and *Norburn* v. *Hilliam* (3), that the withdrawal of a juror is not a legal determination of the cause, but is only a determination in this sense, that unless something very special happens the Court will hold the parties to their understanding and will stay any further proceedings in the

(1) 14 M. & W. 804. (2) 7 Dowl. 786.
(3) Law Rep. 5 C. P. 129.

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action. That is the legal effect of withdrawing a juror, which stands upon no higher level, so far as its effecting a legal determination of the action is concerned, than the discharge of a jury under ordinary circumstances. What was there in the present case to prevent the action going on? One of the parties had taken the benefit of the settlement, and instantly proceeded to violate not only its spirit but also its positive terms. I think that my Brother Denman had jurisdiction to act as he did, and that he exercised a very sound discretion in trying the case. It is said that he ought to have left the applicant to come to the Divisional Court and ask for a new trial, but I cannot assent to that proposition, and I think that, as was pointed out by Bovill, C.J., in *Norburn* v. *Hilliam* (1), where the circumstances are such as to make it right to disregard the withdrawal of a juror, the judge at Nisi Prius has power to proceed with the trial of the case. Some years ago a case in which I was counsel was referred to arbitration, and one of the parties having declined to attend before the arbitrator on the ground of the notice being too short, the latter proceeded to hear the cause ex parte. An application having been made by the absent party to set aside the award, an offer was made in court by the successful party, and accepted, to set it aside and refer the matter back to the arbitrator, and an order to this effect was drawn up by consent. As this order involved the setting aside the award, the result was that, there being no award actually made, each party was technically in a position to revoke the submission to arbitration. The very day that the order was made the originally unsuccessful party executed a deed revoking the submission, but the Court at once ordered that the solicitor should bring back the rule into the office, and on the ground of the breach of faith on the part of one of the parties ordered the settlement to be set aside, and heard the motion to set aside the award on the merits, with the result that they discharged it. As the matter is of considerable importance on grounds of general application, I have had the affidavits filed and the orders made by the Court looked out, and have verified my recollection by reference to them. This case seems to me exactly in point, for if the Divisional Court had,

(1) Law Rep. 5 C. P. 132.

under similar circumstances, power to disregard its own order, why had not my Brother Denman the same power? I think he clearly had, and that he exercised it rightly.

Motion dismissed.

Solicitors for plaintiff: *Bolton, Robbins, & Co., for Dymond, Exeter.*

Solicitors for defendants: *S. Hamilton, for Friend & Beal Exeter.*

W. J. B.

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4. —— *Composition—Approval by Court—Discretion of Registrar—Appeal—Special Resolution—Confirmation—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 23, 28.] A special resolution of creditors under s. 23 of the Bankruptcy Act, 1883, entertaining a proposal for a composition after an adjudication of bankruptcy, requires confirmation at a second meeting of the creditors, in the same way as a special resolution under s. 18 entertaining a similar proposal before adjudication.—In the exercise of his discretion as to the approval of a composition or scheme, the registrar ought to consider both the interest of the creditors and the conduct of the debtor, and if it is manifest that the composition or scheme is the best thing for the creditors, the registrar is not bound to refuse to approve of it because the debtor has been guilty of offences under s. 28, sub-s. 3, of the Act.—The Court of Appeal will not review the discretion of the registrar in approving of a composition or scheme, unless it is clear that he has exercised it wrongly. EX PARTE KEARSLEY. IN RE GENESE - - - - C. A. 168

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6. —— *Receiving Order, Discharge of—Official Receiver, Powers of—Scheme of Arrangement—Consent of Creditors—Conduct of Debtor—Public Examination—Discretion of Court to refuse Discharge of Receiving Order before Debtor's Public Examination—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 35, 68, 69.] A receiving order having been made against a debtor upon his own petition, his public examination was adjourned; and ultimately, the creditors accepted a scheme of arrangement under which they received less than the full amount of their debts. In an application to have the receiving order discharged, made by the debtor with the concurrence of all the creditors, the official receiver appeared and objected to the discharge of the order until after the public examination has been held, on the ground that he was not satisfied with the debtor's conduct:—*Held*, that the official receiver was entitled, under the Bankruptcy Act, 1883, to appear in the application and oppose the discharge of the receiving order; and that the county court judge had a discretion to refuse the discharge. EX PARTE LESLIE. IN RE LESLIE - - - 619

7. —— *County Court—Transfer of Proceedings—Notice to Official Receiver—Bankruptcy Rules*, 1886, *r.* 18.] Notice of an application to transfer the proceedings in a bankruptcy from a county court to the High Court, or vice versâ, must be served upon the official receiver. IN RE JACK [682

8. —— *County Court—Discharge of Bankrupt—Consent Judgment for over 50l.—Registrar's Fee—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 6, *s.* 127, *sub-s.* 4—*Bankruptcy Rules*, 1886, *r.* 240.] Where a county court grants a bankrupt his discharge subject to his consenting to judgment being entered up against him by the trustee for the balance of debts provable under the bankruptcy, the county court has jurisdiction under r. 240 of the Bankruptcy Rules, 1886, to enter up such judgment, although the amount exceeds 50*l.*; but, the rule being silent as to fees, the registrar is not entitled to any fee in respect of such judgment. IN RE HOWE - 573

9. —— *Assets—Voluntary Allowance—Retired Officer of Indian Army—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 53.] A voluntary allowance granted by the Secretary of State for India to an officer of the Indian army on compulsory retirement, to which the recipient has no claim or right, and which can be withdrawn at any time at the discretion of the Secretary of State, is not "income" within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, sub-s. 2, and therefore an order cannot be made for the pay-

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10. —— *Property of Bankrupt—Contingent Interest—Possibility—Interest in Policy of Assurance for benefit of Wife—Introduction of Foreign Law by Contract—Lex fori—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.] A policy of insurance on the life of a husband for the benefit of his wife was, in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The husband was domiciled in England. The application for the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife "for her sole use, if living, in conformity with the statute," and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The statute referred to was a New York statute which enabled a married woman to insure the life of her husband for her sole use, but provided that in certain contingencies his creditors should be entitled to a proportion of the amount secured by the policy. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1886 the wife exercised the right of withdrawal, and the company paid 2959*l.* in respect of the policy:—*Held*, that, even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation:—*Held*, also, that the provision of the New York statute for the payment of a proportion to the husband's creditors was not incorporated in the policy. Ex parte Dever. In re Suse and Sibeth - - - - C. A. 660

11. —— *Trustee in Bankruptcy, Completion of Contract by—Assignment of Moneys due under Building Contract—Power to take Work out of Contractors' Hands.*] A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bankruptcy, to discharge them from the further execution of the work, and employ some other person to complete it, and to

BANKRUPTCY—*continued.*

deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the retention moneys, i.e., the price of work done under the contract retained under the before-mentioned provision, by way of mortgage to secure a debt, and notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee and the mortgagees both claimed the amount of the retention moneys assigned as aforesaid from the building owners. On an interpleader issue to try the title to such moneys:—*Held*, that, in the absence of anything to shew that the building owners had exercised the power of taking the work out of the contractors' hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed.—*Tooth* v. *Hallett* (Law Rep. 4 Ch. 242) distinguished. Drew *v.* Josolyne [C. A. 590

12. —— *Fraudulent Preference — Motive of Debtor—Payment to make good Breach of Trust—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.] In order that a payment or transfer of property, made by a bankrupt within three months before the presentation of the petition on which he was adjudicated a bankrupt, should amount to a fraudulent preference within s. 48 of the Bankruptcy Act, 1883, it is essential that it should have been made by him "with a view of giving a preference" to the creditor to whom it was made: it is not sufficient that the creditor was in fact preferred.—The Court must, therefore, in each case consider as a question of fact what was the real or dominant motive of the bankrupt in making the payment or transfer, and, if the Court comes to the conclusion that the bankrupt's real motive was (e.g.) to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference.—It is also essential that the relation of debtor and creditor should have existed between the parties at the time when the payment or transfer was made. Consequently, a voluntary payment to make good a breach of trust committed by the bankrupt is not within s. 48.—*Ex parte Stubbins* (17 Ch. D. 58) followed. Ex parte Taylor. In re Goldsmid [C. A. 295

13. —— *Post-nuptial Settlement—Solvency of Settlor at Date of Settlement—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.] Upon an application under s. 47 of the Bankruptcy Act, 1883, to set aside a post-nuptial settlement within ten years of its execution, it appeared that if the life

BANKRUPTCY—*continued.*

interest reserved to the settlor under the settlement were taken into account, he was able to pay his debts at the date of the settlement, but that if it were not taken into account he was insolvent:—*Held*, that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was valid as against the trustee in bankruptcy of the settlor. In re Lowndes. Ex parte Trustee - - - 677

14. —— *Winding-up of Company — Mutual Dealings—Claim to Return of Goods pledged—Detinue—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 38—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 158.] The plaintiff company had deposited cigars with the defendants to secure a debt. An order for winding up the company was afterwards made, and, the secured debt having been paid off, the liquidator of the company claimed a return of the cigars, but the defendants refused to give them up. The liquidator brought an action of detinue for the cigars.—Their value having been assessed in the action, the defendants claimed by way of counter-claim to set off another debt due from the company to them against such value by virtue of the conjoint effect of s. 38 of the Bankruptcy Act, 1883 (the "mutual dealings" section), and s. 10 of the Judicature Act, 1875, which applies the rules of bankruptcy law to cases of winding-up:—*Held*, that they were not entitled to do so on the ground that s. 38 is only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of the plaintiffs was to a return of the goods. Eberle's Hotels and Restaurant Company *v.* Jonas [C. A. 459

15. —— *Order of Discharge—Future and Contingent Liabilities—"Liability incapable of being estimated," whether barred by Bankruptcy, where not submitted to Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.] The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenant with the lessors to yield up the demised premises in repair at the end of the term. Eight years before the term expired the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessees tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant for indemnity; but after the term expired they claimed in an action to be indemnified by him in respect of damages recovered against them by the lessors for breach of the covenant to yield up the premises in repair:—*Held*, by Bowen and Fry, L.JJ.—Lord Esher, M.R., dissenting—that the claim of the lessees was barred, under s. 49 of the Bankruptcy Act, 1869, by the order of discharge, because the effect of s. 31 was to make the assignee's future and contingent liability on his covenant for indemnity a debt provable in the liquidation, unless the lessees obtained an order of the Court declaring it to be a liability incapable of being fairly estimated. — Per Lord Esher, M.R. The lessees' claim was not barred by the order of discharge, because the assignee's liability was, at the date of the liquidation proceedings, incapable of being estimated at all; and the provisions of s. 31 did not apply to such a liability. — Judgment of Denman, J., reversed. Morgan *v.* Hardy - - - C. A. 646

16. —— *Order of Discharge—Suspension or Refusal—Discretion of Registrar—Appeal—Locus Standi — "Person aggrieved" — Costs — Undischarged Bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 104 (2).] An unpaid creditor of a bankrupt is a "person aggrieved" by the improper granting of an order of discharge to the bankrupt, and as such is entitled to appeal against the order.—Though the registrar has under s. 28 of the Bankruptcy Act, 1883, a judicial discretion as to granting, or refusing, or suspending a bankrupt's order of discharge, and the Court of Appeal will not readily interfere with the exercise of his discretion, if he has taken a right view of the facts, yet if, in the opinion of that Court, he has come to a wrong conclusion of fact with regard to the bankrupt's conduct, they will vary his decision by absolutely refusing an order of discharge when he has only suspended it.—The Court has jurisdiction to order an undischarged bankrupt to pay costs. Ex parte Castle Mail Packets Company. In re Payne - - - C. A. 154

17. —— *"Usual and Proper Books of Account" to be kept by Bankrupt, what are—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (*a*).] By s. 28 of the Bankruptcy Act, 1883, the Court shall either refuse an order of discharge, or suspend the operation of the order, on proof that the bankrupt "has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy." Where a bankrupt had kept usual and proper books of account in his business as a hatter, but had omitted to keep any books of account in respect of losses he had sustained through making certain purchases of land in the hope of selling again at a profit:—*Held*, that s. 28 only required the bankrupt to keep books of account in the business carried on by him; that he was not bound to keep such books of account as would disclose his financial position otherwise than in respect of such business, and, therefore, that he had not violated the provisions of that section. In re Mutton. Ex parte Board of Trade - - - - 615

18. —— *Practice—Motion—Vivâ Voce Evidence.*] Where parties agree that the evidence on the hearing of a motion shall be taken vivâ voce instead of by affidavit it is unnecessary to obtain the leave of the judge, but written notice must be given to the clerk of the Court, who will enter the case in a special list of motions to be heard with vivâ voce evidence, and an application must subsequently be made to the Court to fix a day for the hearing of the motion.—Where there is no such agreement a motion for leave to take the evidence vivâ voce must be made in the usual way. In re Underhill - - - 115

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BILL OF EXCHANGE—*Bill drawn Abroad on Acceptor in England—Bankruptcy of Acceptor—Proof by Drawer for re-exchange—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 57, 97.] Notwithstanding the provisions of s. 57 of the Bills of Exchange Act, 1882, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill.—And, under s. 37 of the Bankruptcy Act, 1883, the drawer, though he has not paid these damages, can prove in the bankruptcy of the acceptor in respect of his contingent liability to pay them.—Decision of Cave, J. (16 Q. B. D. 702) (subject to a reduction in the amount of proof), affirmed. IN RE GILLESPIE. EX PARTE ROBARTS - - - - C. A. 286

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BILL OF SALE—*After-acquired Property, Assignment of—Future Book Debts.*] A bill of sale contained an assignment of (among other things) all the book debts which might during the continuance of the security become due and owing to the mortgagor:—*Held*, reversing the judgment of the Queen's Bench Division, that such an assignment of future book debts, not being limited to book debts to arise in any particular business, was invalid on the ground that the subject matter was not sufficiently defined, and that it therefore did not operate to pass the property in a book debt which came into existence after the assignment.—*Semble*, by Lord Esher, M.R., that an assignment of future book debts to arise in the course of a particular business specified would be valid. OFFICIAL RECEIVER *v.* TAILBY - - C. A. 25

2. —— *Validity—Repayment of Debt by Instalments — Interest upon Interest — Power to Grantee to pay Rent and Taxes and Premiums of Insurance—Charge of Payments on assigned Chattels—Postponement of Redemption—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule.*] By a bill of sale goods were assigned as security for the repayment of 500*l.* and interest thereon at the rate of 60*l.* per cent. per annum, and the grantor agreed to pay "the principal sum aforesaid, together with the interest then due, by twelve equal monthly payments of 41*l.* 13*s.* 4*d.*, until the whole of the said sum and interest shall be fully paid," and

BILL OF SALE—*continued.*

that in default of payment of any "instalment" then the grantor would pay interest thereon at the rate aforesaid from the date when such instalment should become due until full payment thereof. The grantor also agreed (inter alia) to insure the assigned goods, and pay all premiums, and that upon default the grantee might do so and "charge the costs thereof, with interest at the rate of 20 per cent. per annum," to the grantor, and that the same should be considered to be included in the security, and that the grantee might pay all rent, rates, and taxes at any time due in respect of the messuage in which the goods might be, and that thereupon all such payments made by the grantee, together with interest at the rate of 20 per cent. per annum, should be a charge on the goods, which should not be redeemed until full payment of all such sums and interest:—*Held*, that upon the true construction of the bill of sale interest upon interest was not reserved, but that the word "instalment" referred only to the monthly payments of principal:—*Held*, also, that the form of bill of sale in the schedule to the Bills of Sale Act, 1882, does not require that the payments of interest should be always of equal amount, and that therefore the bill of sale was not void on the ground that the payments of interest would vary in amount from time to time.—*Held*, also, on the authority of *Ex parte Stanford* (17 Q. B. D. 259), that the provisions for the payment of rent, rates, taxes and premiums by the grantee, and the charge of the sums so paid by him upon the goods, did not render the bill of sale void.—Judgment of Queen's Bench Division (17 Q. B. D. 80) that the bill of sale was void reversed. GOLDSTROM *v.* TALLERMAN - - - - - C. A. 1

3. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9—*Consideration, Statement of—Form in Schedule—Bill of Sale given by way of Indemnity to a Surety—Practice—Appeal, whether final or interlocutory—Order on Appeal by Motion against the Judgment of County Court—Interpleader—Order LVIII., r.* 3; *Order LVII., r.* 13.] By a bill of sale expressed to be given in consideration of the grantee thereof having at the request of the grantor become guarantee, and signed a promissory note for the payment of a sum of 45*l.* by the grantor of which 32*l.* or thereabouts was then owing, the grantor assigned to the grantee certain chattels, described in a schedule, by way of security for any moneys which the grantee might be called upon to pay in respect of such guarantee and interest thereon at the rate of 5*l.* per cent. per annum, and the grantor agreed that he would pay to the grantee any sums as aforesaid together with interest then due by monthly payments of 2*l.* on the first of every month:—*Held*, that the consideration for which the bill of sale was given was sufficiently set forth, but also (reversing the decision of the Queen's Bench Division) that the bill of sale was void by virtue of 45 & 46 Vict. c. 43, s. 9, as not being in accordance with the form in the schedule to that Act.—An order made by the Queen's Bench Division upon an appeal from the judgment of a county court on an interpleader issue affirming such judgment is a final

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order within Order LVIII., r. 3. HUGHES *v.* LITTLE - - - - - C. A. 32

4. —— *Validity—Power of Sale—Mortgage Debt made payable in one Sum—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 20—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Scheduled Form.*] A bill of sale, given as security for money, was in the form set forth in the schedule to the Bills of Sale Act, 1882, except that the mortgage debt (instead of being made payable by instalments) was made payable, with interest, in one sum, a month after the date of the deed, and there was a covenant by the grantor, in case the principal money should not be then paid, to pay interest half-yearly on the principal money remaining unpaid. There was also a covenant by the grantor to insure the chattels comprised in the deed, and to produce the receipts for premiums to the grantee:—*Held*, that the bill of sale was valid, and that, interest being in arrear for more than two months, the grantee had power to seize the chattels, and to sell them after the expiration of five days from the seizure.—Per Bowen and Fry, L.JJ. The power of sale was conferred by s. 19 of the Conveyancing Act, 1881, subject to the restrictions imposed by s. 20 of that Act and by s. 13 of the Bills of Sale Act of 1882.—Per Lord Esher, M.R. The Conveyancing Act did not apply, but there was an implied power to seize and sell under the Act of 1882.—A bill of sale given as security for money, by which the mortgage debt is made payable in one entire sum, is "in accordance with" the statutory form. WATKINS *v.* EVANS - - - C. A. 386

5. —— *Equal Payments of Principal—Terms for the Maintenance or Defeasance of the Security—Covenant for further Assurance—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule.*] The form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, is, in respect of the covenant by the grantor to pay the principal sum secured "by equal payments" at specified times, directory and not obligatory; so that a covenant to pay the principal sum by unequal payments at the specified times does not render a bill of sale void.—A covenant that the grantor, and all persons claiming through or under him will at all times at his cost execute and do all such assurances and things for the further and better assuring all or any of the chattels assigned to the grantee, and enabling him to obtain possession of the same, as may by him be lawfully required, is a provision "for the maintenance of the security," the insertion of which in a bill of sale is permitted by the Act of 1882.—The power to sell the chattels assigned by a bill of sale carries with it implied trusts with respect to the moneys produced by the sale. Where the bill of sale contained an express declaration that the grantee should retain out of the sale moneys the principal sum, or so much thereof as might for the time being remain unpaid, and the interest then due, together with all costs, charges, payments, and expenses incurred or sustained in and about entering the grantor's premises and in discharging any distress, execution, or other incumbrance on the chattels assigned, and seizing, taking, retaining

BILL OF SALE—*continued.*
and keeping possession thereof and in and about the carriage, removal, warehousing, valuing, or sale thereof (including the cost of inventories, catalogues or advertising):—*Held*, that the trusts declared of the sale moneys were such as might reasonably and properly be inserted, and did not differ from the trusts that would have been implied if there had been no such express declaration.—Decision of Cave, J., affirmed. IN RE CLEAVER. EX PARTE RAWLINGS - C. A. 489

6. —— *Terms for the Maintenance or Defeasance of the Security—Power of Sale—Provision exempting Purchaser from Inquiry as to Default—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule.*] A bill of sale contained powers for the grantees, upon default being made by the grantor in payment of any of the sums secured, to enter upon the premises and seize and sell the goods assigned, and a stipulation that upon any such sale the purchaser should not be bound to see or inquire whether any such default had been made:—*Held* (affirming the decision of Fry, L.J.), that this stipulation was not for the "maintenance" or for the "defeasance" of the security, within the meaning of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and of the instructions given in the form in the schedule to that Act; that the effect of the stipulation was to alter, to the prejudice of the grantor, the legal rights which the Act and the form were intended to secure to him, and therefore that the bill of sale was void under s. 9 as not being in accordance with the form. BLAIBERG *v.* BECKETT C. A. 96

7. —— *Validity—Power of Sale—Proviso excluding s.* 20 *of the Conveyancing Act*, 1881—*Power to break open Doors and Windows and seize Goods—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 2, 19, 20—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Form in Schedule.*] A bill of sale of personal chattels, given as security for money lent, contained a provision "that the power of sale conferred on the mortgagees by the Conveyancing Act, 1881, shall be exercisable by them in every respect as if the 20th section of the said Act had not been enacted." An express power was given to seize the chattels for any of the causes specified in s. 7 of the Bills of Sale Act, 1882, but for no other cause, and for that purpose to break open the doors and windows of the premises where the chattels might be:—*Held*, by Lord Esher, M.R., and Cotton, Lindley, Bowen, and Lopes, L.JJ. (Fry, L.J., dissenting), that the bill of sale was not made void by s. 9 of the Bills of Sale Act, 1882.—Decision of Manisty and Cave, JJ., affirmed.—Per Cotton, Lindley, and Bowen, L.JJ.: A mortgagee of personal chattels, of which he has taken possession, has, without any express power in the mortgage deed, upon default in payment of the mortgage money by the mortgagor, and after reasonable notice to him, power to sell the chattels.—Consequently, if a bill of sale to which the Bills of Sale Act, 1882, is applicable, contains an express power for the grantee to seize the goods (such a power being authorized by that Act as a provision "for the maintenance of the security"), the grantee, when he has seized the

BILL OF SALE—*continued.*

goods, has power to sell them after the expiration of the five days fixed by ss. 7 and 13 of that Act. In such a case, therefore, the power of sale conferred by s. 19 of the Conveyancing Act, 1881, is not required, and is not incorporated, and a proviso in the deed excluding the operation of s. 20 of that Act is merely superfluous, and does not invalidate the deed under s. 9 of the Act of 1882.—If a bill of sale subject to the Act of 1882 contains provisions relating to the seizure of the goods, which are not contrary to any express provision of that Act, though they may be in part void under the general law, it is not thereby rendered invalid.—Per Lord Esher, M.R., and Lopes, L.J.: The enactment by the Act of 1882 of a statutory form of bill of sale negatives, and is inconsistent with, the incorporation in a bill of sale subject to that Act of the power of sale conferred by the Conveyancing Act, 1881, and the Act of 1882 gives by implication to the grantee under such a bill of sale power to sell the goods at the expiration of five days after they have been seized.—And, even if a power of sale is not given by implication, a power to seize the goods may be lawfully inserted in the deed, and the grantee, having seized the goods, can sell them as assignee of them, and if the grantor does not redeem them within five days, his right of redemption will be barred.—*Semble*, per Fry, L.J.: That a mortgagee (as distinguished from a pledgee) of chattels has, in the absence of statute, no implied power to sell them on default by the mortgagor, even if he has taken possession of them.—But, at any rate, the Bills of Sale Act, 1882, implies that the power of sale conferred by s. 19 of the Conveyancing Act is, with the fetters on its exercise imposed by s. 20 of that Act, imported into the scheduled form of bill of sale, and an attempt to exclude the operation of s. 20 will render a bill of sale void under s. 9 of the Act of 1882. EX PARTE OFFICIAL RECEIVER. IN RE MORRIT - - - - C. A. 222

8. —— *Validity — Covenant "necessary for maintenance of security"—Power to seize—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13—*Form in Schedule.*] A bill of sale, given as security for money, assigned to the grantees, who were auctioneers, the chattels specifically described in a schedule, and which were stated to be then in a certain house. The grantor covenanted (inter alia) that he would not remove the chattels from the premises where they then were, without the previous consent in writing of the grantees; that he would not permit the chattels, or any part thereof, to be destroyed or injured, or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear thereof, and would, whenever any of the chattels were destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same; and that he would, on demand in writing, produce to the grantees his last receipt or receipts for the rents, rates, and taxes in respect of the premises where the chattels then were. And it was agreed that, in case default should be made by the grantor (inter alia) in the performance of any of the covenants thereinbefore contained on his part, all of which covenants were thereby declared and agreed

BILL OF SALE—*continued.*

to be necessary for the maintenance of the security thereby created, it should be lawful for the grantees after any such default without notice, immediately or whenever they should think fit, to seize and take possession of the chattels, and, after the expiration of five clear days, to sell the same, and out of the proceeds of sale in the first place to reimburse themselves the costs, charges, and expenses of and attending such sale, including therein the full charges and commission of the grantees as auctioneers, as if they were selling on behalf of the grantor. At the end of the deed was a proviso that the chattels should not be liable to seizure or to be taken possession of by the grantees for any cause other than those specified in s. 7 of the Bills of Sale Act. 1882:—*Held*, reversing the decision of Bowen, L.J. (17 Q. B. D. 459), that the covenant to replace and repair articles destroyed, injured, or deteriorated, was "necessary for maintaining the security," and that the bill of sale was not void because power was given to seize on a breach of that covenant.—But *held*, that the bill of sale was void because it authorized the grantees to retain their commission as auctioneers out of the proceeds of the sale of the chattels, this being a provision not for the maintenance of the security, but for obtaining for the grantees in addition to the security, their trade profits as auctioneers by the sale, an advantage which they would not have had if the statutory form had been followed.—*Held* (by Sir James Hannen), that the covenant not to remove the chattels without the consent of the grantees, was necessary for maintaining the security; and *semble*, that the unqualified covenant to produce the receipts for rent, rates, and taxes on demand was also necessary.—The expression "necessary for maintaining the security" means, not the maintenance of a sufficient security less than that agreed to be given, but the maintenance of the security created by the bill of sale, and the security is maintained only when the subject-matter of the charge, and the grantee's title to it, are preserved in as good plight and condition as at the date of the bill of sale.—If a stipulation is not necessary for the maintenance of the security, it cannot be made so by the agreement of the parties.—*Semble*, that if a bill of sale contains a power to seize in an event not authorized by the Act, the insertion of a proviso that the goods shall not be liable to seizure for any cause other than those specified in s. 7 of the Act, will not render the deed valid. FURBER *v.* COBB - C. A. 494

BILL OF SALE—Mortgage—Allotment clause—Bills of Sale Acts - - - 11
See PRACTICE. 11.

BOARD OF TRADE—Detention of ship for survey—Action—Right to trial at bar—Prerogative of Crown - - - 43
See CROWN.

—— Tramway—Appointment of referee—Local authority—Dispute as to paving - 39
See TRAMWAY.

BOOK DEBT—Assignment of future book debts—Bill of sale - - - - 25
See BILL OF SALE.

BOROUGH—Franchise - - - 418
See Parliament. 2.

BROKER—Personal liability—Sale of goods — Usage—Evidence, admissibility of 708
See Principal and Agent. 3.

BUILDING CONTRACT—Completion by trustee in bankruptcy—Assignment of moneys due under building contract - 590
See Bankruptcy. 11.

BURIAL ACTS — *Burial Ground — "Dwelling-house"—Curtilage—Burial within* 100 *Yards of a Dwelling-house, Distance how to be measured*—18 & 19 *Vict. c.* 128, *s.* 9.] By 18 & 19 Vict. c. 128, s. 9, no ground not already used as or appropriated for a cemetery shall be used for burials "within the distance of one hundred yards from any dwelling-house" without the consent of the owner, lessee, or occupier of such dwelling-house:—*Held*, that the word "dwelling-house" did not, for the purposes of the Act, include the curtilage, and therefore that the specified distance must be measured from the walls of the dwelling-house. Wright *v.* Wallasey Local Board - - - - - 783

CARRIER — *Receiving-Office — Loss of Goods — Felonious Act of Servant—Carriers Act* (11 *Geo.* 4 & 1 *Wm.* 4, *c.* 68), *ss.* 5, 8.] A parcel of silk was delivered at a receiving-office for transmission to a station on the defendants' railway. No declaration of value was made at the time of delivery. The place where the goods were delivered was stated in the published time tables of the defendants to be a receiving-office for parcels and goods intended for carriage by the defendants. The goods were collected in due course by the defendants and taken to one of their stations; while there they were obtained by a person in the employ of the proprietor of the receiving-office, by means of a forged order, and were stolen:—*Held*, that the defendants were not protected by the provisions of the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), as the loss had arisen from the felonious act of a person who was a servant of the defendants within the meaning of s. 8 of that Act. Stephens *v.* London and South Western Railway Company C. A. 121

—— Railway company — Carriage of dogs — Reasonable condition - - 176
See Railway. 2.

CASES—*Birch* v. *Birch* (8 P. D. 163) approved
See Practice. 15. [127

—— *Brown* v. *Watkins* (16 Q. B. D. 125) explained - - - - 193
See Practice. 5.

—— *Coomber* v. *Justices of Berks* (9 App. Cas. 61) followed - - - - 161
See Poor-rate. 2.

—— *Daubuz* v. *Lavington* (13 Q. B. D. 347) approved and followed - - 11
See Practice. 11.

—— *De Mattos* v. *North* (Law Rep. 3 Ex. 185) followed - - - - 346
See Insurance—Marine.

—— *Dent* v. *Dent* (Law Rep. 1 P. & M. 366) distinguished - - - 127
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CASES—*continued.*

—— *Dudley Gasworks Co.* v. *Warmington* (50 L. J. (M. C.) 69) distinguished - 107
See Gasworks.

—— *Ford* v. *Barnes* (16 Q. B. D. 254) followed
See Parliament. 3. [426

—— *Grant* v. *Norway* (10 C. B. 665) followed
See Ship. [147

—— *Hutchinson* v. *Tatham* (Law Rep. 8 C. P. 482) considered - - - 708
See Principal and Agent. 3.

—— *Maidstone Union, Guardians of* v. *Guardians of Holborn Union* (17 Q. B. D. 817) approved and followed - 528
See Poor Law. 2.

—— *Moyce* v. *Newington* (4 Q. B. D. 32) overruled - - - - 322
See Sale of Goods.

—— *Reg.* v. *Rundle* (1 Dear. & Pearce, 482) questioned - - - - 486
See Criminal Law. 4.

—— —— v. *School Board for London* (17 Q. B. D. 738) explained and distinguished 403
See Poor-rate. 5.

—— *Smith* v. *Reynolds* (1 H. & N. 221; 25 L. J. (Ex.) 337) followed - - 346
See Insurance—Marine.

—— *Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (14 Court of Session Cases, 4th Series, 34) approved
See Revenue. 5. [720

—— *Stanford, Ex parte* (17 Q. B. D. 259) followed - - - - 1
See Bill of Sale. 2.

—— *Stubbins, Ex parte* (17 Ch. D. 58) followed
See Bankruptcy. 12. [295

—— *Tooth* v. *Hallett* (Law Rep. 4 Ch. 242) distinguished - - - 590
See Bankruptcy. 11.

—— *Woodley* v. *Michell* (11 Q. B. D. 47) distinguished - - - - 17
See Ship. 4.

CHARTERPARTY — Cargo to be loaded from shore at ship's risk—Excepted perils 63
See Ship. 3.

—— Excepted perils—"Dangers and accidents of navigation" — Collision caused by negligence of other vessel—Deduction from freight of cost of cargo short delivered - - - - 17
See Ship. 4.

—— Loss of goods—Liability of shipowner—Bill of lading — How far controlling charterparty - - - 67
See Ship. 2.

CHURCH— *Churchwardens, Authority of — Free Seats — Distribution of — Resistance to Churchwarden—Violent Behaviour*—23 & 24 *Vict. c.* 32, *s.* 2.] Churchwardens of a church with free seats have authority to direct, for the maintenance of order and decorum, in which of those seats certain classes of the congregation may and others may not sit. A person may be convicted by justices, under 23 & 24 Vict. c. 32, s. 2, of violent behaviour

CHURCH—*continued.*
in a church, although such behaviour was in assertion of a bonâ fide claim of right. ASHER *v.* CALCRAFT - - - - - 607

CHURCHWARDEN—Authority — Free seats — Distribution of—Disturbance - 607
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CLUB—Revenue—Duty on property of bodies corporate and incorporate—"Funds voluntarily contributed" - - 720
See REVENUE. 5.

COLLEGE—Rateable value—Rateability of trustees to poor-rate - - - 403
See POOR-RATE. 5.

COMMITMENT—Order for—Judgment summons—Order for debt to be paid by instalments—County court - - - 213
See COUNTY COURT. 3.

COMPANY — Secretary — Representation — Authority to bind company - - 815
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—— Secretary—Representation by secretary for his own benefit—Liability of company
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—— Debenture stock—Over issue — Liability of directors—Warranty of authority - 54
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—— Winding-up— Liquidator — Power to serve bankruptcy notice—Form of notice 446
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—— Winding-up— Mutual dealings — Claim to return of goods pledged—Detinue 459
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COMPOSITION—Approval by Court—Discretion of registrar - - - - 168
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—— Power of Court to enforce payment—Composition after adjudication of bankruptcy
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CONFLICT OF LAWS—Foreign bond—Negotiable instrument — Custom of merchants — Bonâ fide holder, right of - - 515
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—— Executor and administrator—Contract when no personal representative—Ratification by administrator - - - 116
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COPYRIGHT—Dramatic piece—Penalty—Action for—Interrogatories - - 625
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COSTS—County court—Certificate for costs on higher scale—Question of character 105
See PRACTICE. 19.

—— Private bill—Vexatious opposition—Summary procedure to enforce payment 303
See PARLIAMENT. 5.

—— Parliament—Vexatious opposition to bill—Order upon persons not actual petitioners - - - - 787
See PARLIAMENT. 6.

—— Reference—Costs to abide event of award—Award for less than 50*l.* - - 244
See PRACTICE. 2.

COSTS—*continued.*
—— Security for—Appeal from county court—Infant plaintiff—Insolvent next friend
See PRACTICE. 17. [585

—— Undischarged bankrupt—Jurisdiction 154
See BANKRUPTCY. 16.

COUNTY COURT—*Judgment Debt—Interest*—1 & 2 *Vict. c.* 110, *s.* 17.] A county court judgment debt carries interest under 1 & 2 Vict. c. 110, s. 17. THE QUEEN *v.* COUNTY COURT JUDGE OF ESSEX - - - - - - 638

2. —— *Judgment Debt—Interest*—1 & 2 *Vict. c.* 110, *s.* 17.] A county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17.—Decision of the Queen's Bench Division (18 Q. B. D. 638) reversed. THE QUEEN *v.* COUNTY COURT JUDGE OF ESSEX - - C. A. 704

3. —— *Practice — Jurisdiction — Judgment Summons—Order for Committal of Debtor—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Prohibition.*] Upon a judgment summons taken out under s. 5 of the Debtors Act, 1869, there is no jurisdiction to make an order that the debt be paid by instalments, and that the debtor be committed to prison in default of payment of any of the instalments. THE QUEEN *v.* JUDGE OF BROMPTON COUNTY COURT - - - - - C. A. 213

—— Appeal to High Court—Judgment—Order whether final or interlocutory—Court of Appeal - - - - 32
See BILL OF SALE. 3.

—— Appeal — Infant plaintiff—Insolvent next friend—Security for costs - - 585
See PRACTICE. 17.

—— Action remitted for trial — Jurisdiction —"Admitted set-off" - - 635
See PRACTICE. 18.

—— Bankruptcy—Consent—Judgment for over 50*l.* - - - - - 573
See BANKRUPTCY. 8.

—— Bankruptcy — Transfer of proceedings — Notice to official receiver - - 682
See BANKRUPTCY. 7.

—— Certificate for costs on higher scale—Question of character - - - - 105
See PRACTICE. 19.

CRIMINAL LAW—*Cruelty to Animals—Operation for Purpose of improving Animal*—12 & 13 *Vict. c.* 92, *s.* 2.] A person who, with reasonable care and skill, performs on an animal a painful operation, which is customary and is performed bonâ fide for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of the offence of cruelly ill-treating, abusing, or torturing the animal, within the meaning of 12 & 13 Vict. c. 92, s. 2, even though the operation is in fact unnecessary and useless. LEWIS *v.* FERMOR [532

2. —— *Trial—Misreception of Evidence, Effect of.*] In a criminal trial, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad; and this notwithstanding that there was other evidence before them properly admitted and sufficient to warrant a conviction. THE QUEEN *v.* GIBSON - - - - C. C. R. 537

CRIMINAL LAW—*continued.*

3. —— *Evidence—Attempt to commit Rape—Evidence of previous Connection between Prosecutrix and Prisoner, whether admissible.*] On the trial of an indictment charging an assault with intent to rape if the prosecutrix, in answer to cross-examination, denies having voluntarily had connection with the prisoner prior to the alleged assault, evidence to contradict her by proving such prior connection is admissible on his behalf. THE QUEEN *v.* RILEY - - - C. C. R. 481

4. —— *Lunatic—Ill-treatment of, by Parent—Liability of Parent to Conviction—Person having "the care or charge" of Lunatic*—16 & 17 *Vict. c.* 96, *s.* 9.] The parents of a lunatic who resides with them under their care are persons "having the care or charge" of a lunatic within the meaning of 16 & 17 Vict. c. 96, s. 9, and may be convicted under that section for ill-treating such lunatic.—*Reg.* v. *Rundle* (1 Dear. & Pearce, 482) questioned. BUCHANAN *v.* HARDY - 486

5. —— *Rogue and Vagabond—Astrology—Professing to tell Fortunes*—5 *Geo.* 4, *c.* 83, *s.* 4.] The appellant was convicted under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person pretending or professing to tell fortunes , . . to deceive and impose on any of His Majesty's subjects." He had published advertisements in various newspapers offering to cast nativities, give yearly advice and answer astrological questions. A detective wrote to him and received from him a circular setting forth the appellant's views of astrology as a science, and stating that by the positions of the planets in the nativity and their aspects to each other he was able to tell any applicant's fortune in the various events of life in return for certain remuneration. He never actually told anything to the detective, and there was no evidence to shew whether or not he believed in the truth of his professions :—*Held*, that on this evidence the appellant was rightly convicted. PENNY *v.* HANSON - - 478

—— Property obtained by false pretences—Conviction of fraudulent buyer—Sale by agent—Order of restitution—"Criminal cause or matter" - - - 314
See PRACTICE.

—— Property obtained by false pretences—Sale in market overt—Innocent purchaser—Conviction of fraudulent buyer—Order for restitution - - - 322
See SALE OF GOODS.

CROWN, PREROGATIVE OF—*Right to Trial at Bar—Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *s.* 10—*Detention of Ship for Survey—Action against Board of Trade—Interest of Crown—Change of Venue—Crown Suits Act*, 1865 (28 & 29 *Vict. c.* 104), *s.* 46.] By the Crown Suits Act, 1865, s. 46, where in any cause in which the Attorney General is entitled on behalf of the Crown to demand as of right a trial at bar, he states to the Court that he waives that right, "the Court on the application of the Attorney General shall change the venue to any county he may select":—*Held* (affirming the judgment of the Queen's Bench Division), that an action under s. 10 of the Merchant Shipping Act, 1876, against the Secretary of the Board of Trade, to recover

CROWN, PREROGATIVE OF—*continued.*

damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the Attorney General is entitled to demand as of right a trial at bar in such an action, and that the Court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. DIXON *v.* FARRER - - - C. A. 43

CRUELTY TO ANIMALS—Operation for purpose of improving animals - - 532
See CRIMINAL LAW.

CURTILAGE — Dwelling-house—Burial Acts—Measurement of distance - - 783
See BURIAL ACTS.

DAMAGES—Measure of—Loss of goods—Carrier by sea - - - - 67
See SHIP. 2.

—— Carrier by sea—Loss of goods—Advance of freight - - - - 373
See SHIP. 5.

—— Measure of—Company—Debenture stock—Over issue—Liability of directors - 54
See PRINCIPAL AND AGENT. 3.

DEFAMATION — Publication injurious to property—Death of plaintiff—Survival of action - - - - 771
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DETINUE—Mutual dealings—Claim to return of goods pledged - - - 459
See BANKRUPTCY. 14.

DISCOVERY—Examination of person other than debtor - - - - 588
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—— Inspection of property—Inspection as between co-plaintiffs or co-defendants 193
See PRACTICE. 5.

DISTANCE — Measurement—"Dwelling-house"—Curtilage - - - - 783
See BURIAL ACTS.

DISTRESS—Time when rent deemed to be due—Amount for which landlord can distrain—Agricultural Holdings Act, 1883 642
See LANDLORD AND TENANT.

DIVORCE — Compromise of action — Power to make agreement of compromise an order of Court in the Queen's Bench Division
See PRACTICE. 3. [544

DOG—Carriage of dogs—Reasonable condition—Railway company - - - 176
See RAILWAY. 2.

"DWELLING-HOUSE" — Curtilage — Burial within 100 yards of dwelling-house—Mode of measurement - - 783
See BURIAL ACTS.

ELECTION—Councillor—Declaration of election, effect of—Municipal corporation—Disqualification—Mandamus - - 349
See MUNICIPAL CORPORATION.

—— Councillor—Municipal corporation—Return of expenses—Liability to make return, although no expenses actually incurred
See MUNICIPAL CORPORATION. 2. [336

ELECTION—*continued.*

—— Local board—Disqualification of candidate—Composition with creditors—Time for filling casual vacancy - - 269
See LOCAL GOVERNMENT ACTS. 2.

EQUITABLE MORTGAGE—*Deposit of Title Deeds—Parol Trust in favour of Creditor—Bankruptcy.*] A., being indebted to a banking company in respect of an overdrawn account, wrote to the directors promising to give them, when required, security over his reversionary interest in one-fifth share of a farm, to come into possession on the death of the life tenant; but no formal security was ever executed in accordance with this promise. After the death of the life tenant the deeds of the farm came into the possession of A.'s brother, the manager of the bank, for the purpose of paying the succession duty; and he continued in possession of them, claiming, as regards A.'s share, to hold them for the banking company with the consent of A. (verbally given) as security for the overdrawn account. There was no memorandum of the deposit in the bank books, nor was the usual printed form of deposit of title deeds by way of security made use of with reference to the transaction. A. subsequently became bankrupt:—*Held*, that the company had not a valid equitable mortgage on the bankrupt's share in the farm, and that they could not hold the rents as against his trustee in bankruptcy. EX PARTE BRODERICK. IN RE BEETHAM - - 380

2. —— *Oral Promise—Subsequent Oral Direction to hold Title Deeds as Security—Statute of Frauds — Part Performance.*] The bankrupt being indebted to a banking company, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, and who held the title deeds. The mother afterwards died, and the title deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told the bankrupt that he had possession of the deeds, and that he held his (the bankrupt's) one-fifth for the bank. The bankrupt expressed his assent:—*Held* (affirming the decision of the Queen's Bench Division), that the company had not a valid equitable mortgage of the bankrupt's share in the farm, for there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute. EX PARTE BRODERICK. IN RE BEETHAM - - C. A. 766

ESTOPPEL — Bill of lading — Quality marks—Representation—Authority of master
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—— Conduct—Representation—Proximate cause of loss—Wharfinger - - 139
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—— Company — Secretary — Authority to bind company - - - - 815
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—— Misreception of—Trial - - 537
See CRIMINAL LAW. 2.

—— Vivâ voce—Motion—Practice - - 115
See BANKRUPTCY. 18.

EXECUTION — Stay of — Appeal to Court of Appeal—Jurisdiction of master - 435
See PRACTICE. 12.

EXECUTOR—*Actio personalis moritur cum personâ—Libel — Publication injurious to Property — Slander of Title—Death of Plaintiff—Continuance of Action by Personal Representative—Rules of Supreme Court*, 1883, *Order XVII., rr.* 1, 2.] An action for defamation, either of a private character or of a person in relation to his trade, comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives:—*Held*, therefore, that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. HATCHARD *v.* MÈGE - - 771

EXECUTOR AND ADMINISTRATOR—*Contracts made whilst no Personal Representative—Ratification by Administrator, Effect of—Services for Benefit of Estate.*] In order to make the estate of a deceased person liable for services rendered whilst there is no personal representative, it must be shewn, not only that the services were for the benefit of the estate, but that they were rendered under a contract with someone who subsequently by obtaining letters of administration became authorized to bind the estate, and ratified the contract. IN RE WATSON. EX PARTE PHILLIPS - - - - - 116

FALSE PRETENCES—Property obtained by false pretences—Pledge to innocent person—Sale by him—Conviction of fraudulent pledgor—Power to order restitution of proceeds of sale - - - 314
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—— Property obtained by false pretences—Sale in market overt—Conviction of fraudulent buyer - - - - 322
See SALE OF GOODS.

FILING—Default in filing judge's order—Judgment not void as against judgment debtor - - - - 201
See PRACTICE. 10.

FOREIGN BOND — Negotiable instrument — Custom of merchants—Bonâ fide holder, right of - - - - 515
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FOREIGN LAW—Introduction by contract—Lex fori - - - - - 660
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FRAUD—Company—Representation by agent for his own benefit—Liability of company
See PRINCIPAL AND AGENT. 2. [714

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FRAUDULENT PREFERENCE—Bankruptcy—Motive of debtor—Payment to make good breach of trust - - 295
See BANKRUPTCY. 12.

FREIGHT—Deduction—Short delivery of cargo—Collision caused by negligence of other vessel - - - - 17
See SHIP. 4.

GASWORKS—*Gasworks Clauses Acts*, 1847, 1871 (10 *Vict. c.* 15, *ss.* 38, 49; 34 *& 35 Vict. c.* 41, *ss.* 1, 3, 35)—*Leamington Priors Gas Company's Act*, 1865 (28 *Vict. c. cxxviii.*)—*Special Provisions as to Accounts in Special Act—Incorporation of subsequent General Act containing inconsistent Provisions as to Accounts.*] The Leamington Priors Gas Company's Act, 1865 (28 Vict. c. cxxviii.), which incorporated the Gasworks Clauses Act, 1847, except so far as it might be varied by any provision of the special Act, prescribes by s. 32 a special form in accordance with which the annual accounts of the company were to be made up, in lieu of provisions as to accounts contained in s. 38 of the Act of 1847. By s. 49 of the Act of 1847, undertakers are not to be exempted from any general Act relating to gasworks which may be passed in any future session. By s. 1 of the Gasworks Clauses Act, 1871, that Act and the Act of 1847 are to be construed as one Act, and by s. 35 of the Act of 1871, the undertakers are to make an annual statement of accounts in the form prescribed by that Act, and to furnish copies of the same to any applicant.—The appellants made out their annual statement of accounts in the form prescribed by s. 32 of their special Act, and did not furnish to the respondent, on application, a copy of an annual statement of their accounts made out in the form prescribed by the Act of 1871:—*Held*, that as the appellants' special Act prescribed the form in which the annual statement of accounts was to be made up, the provisions relating to the form of accounts in s. 35 of the Gasworks Clauses Act, 1871, did not apply.—*Dudley Gasworks Co.* v. *Warmington* (50 L. J. (M. C.) 69) distinguished. LEAMINGTON PRIORS GAS COMPANY *v.* DAVIS 107

GUNPOWDER—Conveyance of—"Case or canister" - - - - - 428
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HEIR—Limitations, Statute of—Land in occupation of tenants - - - 796
See LIMITATIONS, STATUTE OF.

HOUSE—Burial Acts—Dwelling-house—Curtilage—Measurement of distance - 783
See BURIAL ACTS.

HUSBAND AND WIFE—*Judicial Separation—Order of Justices upon Conviction of Husband for aggravated Assault upon Wife—Resumption of Cohabitation, Effect of—Matrimonial Clauses Act*, 1878 (41 *& 42 Vict. c.* 19), *s.* 4.] Upon the conviction of a husband for an aggravated assault on his wife, justices made an order, under s. 4 of the Matrimonial Clauses Act, 1878, that the wife should be no longer bound to cohabit with her husband, and that he should pay to her a weekly sum for her maintenance. The wife subsequently resumed cohabitation with her husband for a time, and then again left him:—*Held*, that the order was annulled by reason of the subsequent resumption of cohabitation, and therefore that the wife could not enforce payment of weekly sums alleged to have become due under it after she again left her husband. HADDON *v.* HADDON 778

—— Policy of assurance for benefit of wife—Contingent interest of husband - 660
See BANKRUPTCY. 10.

—— Post-nuptial settlement—Bankruptcy—Solvency of settlor at date of settlement 677
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—— Army—Voluntary allowance by Secretary for India—"Income"—Bankruptcy 111
See BANKRUPTCY. 9.

INFANT—Insolvent next friend—County court—Appeal—Security for costs - 585
See PRACTICE. 17.

INN—*Beerhouse—Sunday closing—Insertion of Condition in Licence—35 & 36 Vict. c.* 94, *s.* 49.] The condition under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 49, requiring the licensed premises therein mentioned to be closed during the whole of Sunday, can only be inserted in a new licence if the applicant for it himself applies to the licensing justices to insert such condition. THE QUEEN *v.* JUSTICES OF KIRKDALE - 248

INSPECTION—Inspection as between co-plaintiffs and co-defendants - - 193
See PRACTICE. 5.

INSURANCE—MARINE—*Policy on Advances on Ship—"Full interest admitted"*—19 *Geo.* 2, *c.* 37, *s.* 1.] A policy insuring cash advances on a ship is within 19 Geo. 2, c. 37, s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute.—*Smith* v. *Reynolds* (1 H. & N. 221; 25 L. J. (Ex.) 337) and *De Mattos* v. *North* (Law Rep. 3 Ex. 185), followed. BERRIDGE *v.* MAN ON INSURANCE COMPANY C. A. 346

—— Advanced freight—Subrogation of insurer to rights of assured - - - 373
See SHIP. 5.

INSURANCE—LIFE—Policy of insurance for benefit of married woman—Contingent interest of husband—Bankruptcy—Foreign law—Introduction in contract
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INTEREST—Judgment debt—County court *See* COUNTY COURT. 1, 2. [638, 704

INTERPLEADER — County court — Appeal by motion to High Court—Order whether final or interlocutory—Court of Appeal *See* BILL OF SALE. 3. [32

—— Sheriff—Amount recoverable by claimant—Particulars of claim - - 390 *See* PRACTICE. 6.

—— Stay of execution—Judgment—Bankruptcy notice - - - - 369 *See* BANKRUPTCY. 3.

—— Goods taken in execution—Title of third party—Right of execution creditor to set up jus tertii against claimant 451 *See* PRACTICE. 7.

INTERROGATORIES—Penalty—Action for 625 *See* PRACTICE. 8.

JUDGMENT—Interest—County court 638, 704 *See* COUNTY COURT. 1, 2.

—— Judge's order by consent—Failure to file order—Judgment not void as against judgment debtor - - - 201 *See* PRACTICE. 10.

—— Interpleader — Stay of execution — Bankruptcy notice - - - - 369 *See* BANKRUPTCY. 3.

JUDGMENT SUMMONS—Order for commitment—Order for debt to be paid by instalments—County court - - 213 *See* COUNTY COURT. 3.

JUDICIAL SEPARATION—Order of justices upon conviction of husband for assault on wife—Resumption of cohabitation - 778 *See* HUSBAND AND WIFE.

JUROR—Withdrawal of—Jurisdiction to re-try action - - - - 822 *See* PRACTICE. 9.

JUSTICES—Sessions house—Poor-rate—Occupation - - - - - 161 *See* POOR-RATE. 2.

LANDLORD AND TENANT—*Distress—Ordinary Course of Dealing—Time when Rent deemed to be due—Amount for which Landlord can distrain—Agricultural Holdings Act*, 1883 (46 & 47 *Vict.* c. 61), *s.* 44.] By s. 44 of the Agricultural Holdings Act, 1883, a landlord cannot distrain for rent which became due more than a year before the distress, provided that, where according to the ordinary course of dealing payment of the rent has been allowed to be deferred until the expiration of a quarter or half-year after the rent legally became due, for the purpose of the section the rent shall be deemed to have become due at the expiration of such quarter or half-year, and not when it legally became due :—*Held*, that in a case within the proviso the landlord was entitled to distrain for rent then legally due, but not yet payable according to the course of dealing, and also for rent which had become legally due more than a year previously, but had become payable according to the course of dealing less than a year previously, although the total amount distrained for exceeded one year's rent. EX PARTE BULL. IN RE BEW - - - - - 642

LANDLORD AND TENANT—*continued.*

—— Mortgage—Attornment clause—Action by mortgagee for possession — Judgment under Order XIV. - - - 11 *See* PRACTICE. 11.

—— Covenant to deliver up premises in repair—Indemnity against covenant—Future and contingent liability - - - 646 *See* BANKRUPTCY. 15.

LANDS CLAUSES ACT—Deficiency in assessment to poor-rate - - - - 549 *See* POOR-RATE.

LIBEL—Publication injurious to property—Death of plaintiff—Survival of action - 771 *See* EXECUTOR.

LICENSING ACTS—Sunday closing—Insertion of condition in licence - - 248 *See* INN.

LIMITATIONS, STATUTE OF—*Action to recover Land—Possession of Tenants—Receipt of Rents by Agent—Ratification—3 & 4 Wm. 4, c. 27, ss. 8, 34—37 & 38 Vict. c. 57, s. 1.*] By 3 & 4 Wm. 4, c. 27, s. 8, "Where any person shall be in possession of any land as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to bring an action to recover such land shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen."—In an action to recover land by the plaintiff as assignee of the co-heiresses of D., the owner in fee of the land, who died intestate, it appeared that after D.'s death the defendant, who had previously acted as her agent and bailiff, continued to receive the rents of the land, which he paid into a bank, stating that he was acting on behalf of the true heir-at-law, and that he was ready to account to the heir-at-law when ascertained. It did not appear that these statements were ever communicated to the co-heiresses, or that the plaintiff in any way acted on the faith of them :—*Held*, by the Court of Appeal, reversing the decision of Stephen, J., that the co-heiresses could not be taken to have been "in possession" of the land through the tenants so as to prevent the statute running from the end of the first year or other period of the tenancy.—By 3 & 4 Wm. 4, c. 27, s. 34, "At the determination of the period limited by this Act for making an entry or distress, or bringing an action, the right and title to the land for the recovery whereof an entry, distress, or action might have been made or brought within such period shall be extinguished" :—*Held*, by the Court of Appeal, reversing the decision of Stephen, J., first, that it was not shewn that the defendant in receiving the rents had acted in the name of the co-heiresses or the rightful owner of the land; secondly, that in any case it was not competent for the co-heiresses after the expiration of the statutory period to ratify the acts of the defendant so as to make his receipt of the rents their receipt. LYELL *v.* KENNEDY [C. A. 796

2. —— *Particular Estate in Land—Estate in Remainder expectant thereon—Conveyance of Par-*

LIMITATIONS, STATUTE OF—*continued.*
ticular Estate—Determination thereof—"Person last entitled"—Right of Remainderman—Limitation of Time—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 2—*Rule in Shelley's Case.*] Where a person entitled to a particular estate in respect of which land is held or the profits thereof or rent received, and upon which a future estate is expectant, conveys away his estate he is not, when the particular estate determines, "the person last entitled to the particular estate upon which the future estate was expectant," and consequently the proviso in s. 2 of the Real Property Limitation Act, 1874, does not apply to limit the time within which the person who on the determination of the particular estate becomes entitled to an estate in possession may make an entry or distress or bring an action to recover such land or rent.—A testator devised certain land to his sons successively for life, beginning with the youngest, and after their death "to be for ever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives for ever." The eldest surviving son being in possession executed, more than six years before his death, a conveyance in fee to the defendant. He left one son, who more than six but within twelve years after his father's death brought this action to recover possession of the land, claiming as devisee under the will of the testator:—*Held*, reversing the judgment of Manisty, J., that the claim was not barred, as the plaintiff's father, having conveyed away his life estate, was not "the person last entitled to the particular estate" on which the plaintiff's estate in remainder was expectant within the meaning of the proviso in s. 2 of the Real Property Limitation Act, 1874.—*Held*, also, that upon the true construction of the will, the rule in *Shelley's Case* (1 Rep. 93) did not apply, and the eldest surviving son of the testator took only a life estate. PEDDER *v.* HUNT - - - 565

—— Death of defendant—Fresh action against executors—Equity of statute - 250
See PRACTICE. 4.

LIQUIDATOR—Company—Voluntary winding-up—Power to serve bankruptcy notice 446
See BANKRUPTCY. 2.

LIVERPOOL—*Court of Passage—Rules of Court—Power to make Rules concerning Practice—Rule ordering Security for Costs—Invalidity—Liverpool Court of Passage Acts* (6 & 7 *Wm.* 4, *c. cxxxv., s.* 4; 16 & 17 *Vict. c. xxi., s.* 52).] By 6 & 7 Wm. 4, c. CXXXV., s. 4, the assessor of the Liverpool Court of Passage may make rules and regulations concerning the practice and costs of the Court.—The assessor made a rule that in frivolous and vexatious actions the registrar should have power to order the plaintiff to give security for the defendant's costs:—*Held*, that the statute did not give power to make such a rule, and the rule was invalid. THE QUEEN *v.* MAYOR, &C., OF LIVERPOOL [510

LOCAL GOVERNMENT ACTS—*General District Rate—"Land used as market gardens or nursery grounds"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).] By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (*b*), "the occupier of any land used as . . . . market gardens or nursery grounds . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof."—The appellant, a market gardener and nurseryman, was the occupier of a piece of land upon which were built sixteen greenhouses or glasshouses, which practically covered the surface of the land; they were built on brick foundations, and were used by the appellant for the purpose of growing fruit and vegetables for sale in the course of his business:—*Held*, affirming the decision of the Queen's Bench Division, that the land with the greenhouses upon it constituted a market garden or nursery ground within the meaning of the Act, and that the appellant was liable to be rated to the general district rate in the proportion of one-fourth part only of the net annual value of the property. PURSER, APPELLANT *v.* LOCAL BOARD OF HEALTH FOR WORTHING, RESPONDENTS [C. A. 818

2. —— *Local Board—Election—Disqualification of Candidate—Composition with Creditors—Time for filling casual vacancy—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *Sched. II., rr.* 5, 65.] A candidate for election as member of a local board of health had assigned all his property by deed to a trustee for the benefit of those of his creditors who should sign the deed, no sum being mentioned in it as a composition to be paid on the debts therein scheduled as due to them, and the creditors signing the deed thereby discharged him from all debts due to them by him:—*Held*, that he was not disqualified under 38 & 39 Vict. c. 55, Sched. II., r. 5, which provides that a person "who has entered into any composition with his creditors," shall be ineligible "so long as any proceedings in relation to such composition are pending," even though at the time of his election some of his creditors had signed the deed, while others did not sign it till after the election, for that the deed was not "a composition with creditors." The time specified by r. 65 of the same schedule which provides that any casual vacancy on the board occurring "by failure duly to elect," shall be filled up by the board within six weeks, is to be computed from the day on which the retiring member goes out of office, and not from the day on which the election of a member to fill his place is held. THE QUEEN *v.* COOBAN [269

3. —— *Sewers—Vesting in Local Authority—Alteration of Sewerage System—Liability for Expenses—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 207.] A piece of land was laid out for building by the owners, and a street laid out, and a sewer made which drained the houses. A local board was afterwards formed. The sewer was sufficient as long as sewage could be discharged into the Thames, but when this was prohibited it became necessary to construct a new sewer to carry the sewage in a different direction. The local board having made a new sewer sought to charge the frontagers with the expenses under s. 150 of the Public Health Act, 1875:—*Held*, that the original sewer was not made by any person for his own profit, and therefore vested in the local board under s. 13 of the Act, and by s. 15 they were bound to keep it in repair, that the

LOCAL GOVERNMENT ACTS—*continued.*
powers given by s. 150 could only be exercised once for all when the street was first sewered, that the construction of the new sewer was work done by the local board under s. 18, and the expenses were payable out of the general district rate under s. 207, and therefore the frontagers were not liable. Bonella *v.* Twickenham Local Board of Health. Holmes *v.* Twickenham Local Board of Health - - - - - 577

LODGER—Franchise—Claim to be registered 412
See Parliament. 4.

LONDON — Police constable — Franchise—Incapacity - - - - 421
See Parliament.

—— Tithes—Rate on house property—Commutation - - - - 599
See Poor-rate. 6.

LUNATIC—Ill-treatment of, by parent—Liability of parent to conviction - - 486
See Criminal Law. 4.

MANDAMUS—Municipal corporation—Election of councillor—Disqualification - 349
See Municipal Corporation.

MARKET GARDEN—General district rate—Land used as market garden - - 818
See Local Government Acts.

MASTER—Jurisdiction — Stay of execution — Appeal to Court of Appeal - 435
See Practice. 12.

MASTER AND SERVANT—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Otherwise engaged in manual labour*"—*Driver of Tramcar.*] The driver of a tramcar is not "a person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880. Cook *v.* North Metropolitan Tramways Company - - - - 683

2. —— *Defect in Condition of Works—Volenti non fit injuria—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.] The plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly so that he fell back into the cooling vat and was scalded. In an action under the Employers' Liability Act, 1880:—*Held* (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), that the defence arising from the maxim volenti non fit injuria had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of negligence arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover. Thomas *v.* Quartermaine - - - C. A. 685

MEDICAL RELIEF — Franchise — Disqualification - - - - - 418
See Parliament. 2.

MIDDLESEX—Sessions house—Poor-rate 161
See Poor-rate. 2.

MINE—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 46—*Notice by Inspector of Causes of Danger—Objection of Owner to remedy Matter complained of—Determination of Matter by Arbitration—Powers of Arbitrator.*] In an arbitration under s. 46 of the Coal Mines Regulation Act, 1872, the duty of the arbitrator is limited to determining whether the matter complained of by the inspector is dangerous and ought to be remedied, and he has no power to determine what is the proper remedy, or to direct that any particular remedy be adopted. In re Arbitration between Secretary of State for Home Department *v.* Fletcher - - C. A. 339

2. —— *Gunpowder, Conveyance of*—"*Case or Canister*"—*Metalliferous Mines Act*, 1872 (35 & 36 *Vict. c.* 77), *s.* 23, *sub-s.* 2 (*b.*).] By the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), s. 22, sub-s. 2, "Gunpowder or other explosive or inflammable substance shall not be taken into the mine except in a case or canister containing not more than four pounds":—*Held*, that the word "case" as used in the section must be taken to mean something solid and substantial in the nature of a canister, and that a bag of linen or calico was not such a "case." Foster *v.* Diphwys Casson Slate Company - - - 428

MISDIRECTION—Motion for new trial—Grounds of notice - - - - 243
See Practice. 16.

MORTGAGE — Attornment clause — Tenancy created by mortgage—Bills of Sale Acts—Judgment under Order XIV. - 11
See Practice. 11.

MORTGAGE, EQUITABLE—Deposit of title deeds—Parol trust in favour of creditor 380, [766
See Equitable Mortgage.

MUNICIPAL CORPORATION—*Election of Councillor — Disqualification — Alderman—Returning Officer—Declaration of Election, Effect of—Public Notice to Electors—Mandamus—Ballot Act*, 1827 (35 & 36 *Vict. c.* 33), *s.* 2, *Sched. I., rr.* 45, 46—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 35, 58.] At an election for the office of a councillor of one of the wards of a borough, R. and P. were the only candidates. At the close of the poll P. objected that R. was disqualified for election by reason of his being an alderman of the borough whose term of office had not expired, and P. claimed himself to be elected whatever might be the result of the poll. The returning officer counted the votes, and then stated to those present the number given to each candidate, the result of the poll being that R. had a majority. Having taken time to consider the objection, the returning officer on the following day issued a public notice stating the number of votes given to each candidate, and the objection, and declaring that P. was duly elected. P. thereupon made and subscribed the declaration of acceptance of the office required by s. 35 of the Municipal Corporations Act, 1882, and attended meetings of the council. R. subsequently made and subscribed a similar declaration and attended meetings of the council:—*Held* (reversing the decision of the Queen's Bench Division,

MUNICIPAL CORPORATION—*continued.*
making absolute a rule for a mandamus to compel the mayor and corporation of the borough to receive P.'s votes at their corporate meetings); (1) that R. was not by reason of his being an alderman disqualified for election to the office of councillor, and that by accepting the latter office he vacated the former; (2) that the returning officer had no power to decide whether R. was disqualified or not; (3) that by stating at the close of the poll the number of votes given to each candidate the returning officer had made a sufficient declaration under s. 2 of the Ballot Act, 1872, that R. was elected, and that the effect of that declaration was not altered by reason of the public notice issued on the following day under rr. 45 and 46 of the rules in the first schedule to that Act; and (4), that the office of councillor was not de facto filled by P. so as to entitle him to hold it until dispossessed by an election petition or by quo warranto. The Queen *v.* Mayor, &c., of Bangor - - - **C. A. 349**

2. —— *Election of Councillors — Return of Expenses—Liability to make, although no Expenses actually incurred—Municipal Elections (Corrupt Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *ss.* 20, 21, *sub-ss.* 3, 5, 7.] The return of expenses and the accompanying declaration which, under the Municipal Elections Act, 1884, every candidate is required to send to the town clerk within twenty-eight days of the election of a town councillor must be sent although no expenses may have been actually incurred by the candidate in and about the election.—The Court will, upon satisfactory proof that the omission happened under such circumstances as to amount to an authorized excuse under the Act, make an order that the return and declaration be made by the candidate notwithstanding the lapse of the prescribed statutory period for making them. Ex parte Robson - - - - **336**

MUTUAL CREDIT — Claim to return of goods pledged—Detinue - - - **459**
See Bankruptcy. 14.

NEGLIGENCE—Master and servant—Defect in condition of works—Knowledge of defect by servant - - - - **685**
See Master and Servant. 2.

—— Master and servant—Employers' Liability Act, 1880—Driver of tramcar - **683**
See Master and Servant.

NEGOTIABLE INSTRUMENT—*Foreign Bond—Conflict of Laws — Custom of Merchants—Bonâ fide Holder, Right of.*] An instrument that is negotiable by the law of a foreign country is not a negotiable instrument by the law of England; so as to give a bonâ fide holder for value a good title against an owner of the instrument, from whom it has been stolen, in the absence of any evidence of a custom of merchants in this country to treat it as negotiable. Picker *v.* London and County Banking Company - - **C. A. 515**

NEXT FRIEND — Insolvency — Appeal from county court—Infant plaintiff - **585**
See Practice. 17.

NOTICE—Official receiver—Transfer of proceedings—County court - - **682**
See Bankruptcy. 7.

OFFICER—Army — Rooms in barracks—Franchise—Compulsory absence on duty **426**
See Parliament. 3.
—— Pension—Execution creditor—Appointment of receiver - - - - **127**
See Practice. 15.
—— Voluntary allowance — Bankruptcy—"Income" - - - - **111**
See Bankruptcy. 9.

OFFICIAL RECEIVER — Bankruptcy — County court—Transfer of proceedings—Notice to official receiver - - - **682**
See Bankruptcy. 7.

PARLIAMENT—*Borough Vote—"Incapacity to vote — Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102)—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 7—*Metropolitan Police Act* (10 *Geo.* 4, *c.* 44), *s.* 18.] By 10 Geo. 4, c. 44, s. 18, a constable of the Metropolitan police-force is disqualified from voting at the election of a member of parliament for certain counties or for any city or borough within the Metropolitan police-district:—*Held*, that such a constable is a person "incapacitated by law or statute from voting," within 41 & 42 Vict. c. 26, s. 28, sub-s. 7, and consequently is not entitled to be retained on the list of voters under the Registration of the People Act, 1867 (30 & 31 Vict. c. 102). Doulon *v.* Halse - - - - - **421**

2. —— *Borough Vote — Disqualification — Medical Relief—Uncertificated Midwife—Medical Relief Disqualification Removal Act*, 1885 (48 & 49 *Vict. c.* 46), *ss.* 2, 4.] The wife of the appellant, being near her confinement, applied to the relieving officer of the union for an order for the attendance of a medical man. The guardians authorized the relieving officer to give her an order for such attendance, but she was in fact attended during her confinement by an uncertificated midwife, who was sent to her and paid by the relieving officer:—*Held*, that the relief afforded to the wife was "medical assistance" within 48 & 49 Vict. c. 46, s. 2, and that the appellant was not disqualified from being registered as a parliamentary voter. Honeybone *v.* Hambridge - - - - - **418**

3. —— *Borough Vote—Occupation Franchise —Non-commissioned Officers' Rooms in Barracks —Compulsory Absence on Duty during the qualifying Year—Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3.] The appellant, a non-commissioned officer, resided with his family in barracks, situate within a borough, in separate rooms allotted to him by the quarter-master general. During twenty-seven days of the qualifying year he was compulsorily absent from the borough, but while so absent his name was retained on the strength of the regimental depôt in the monthly returns to the War Office, and the rooms continued to be occupied by his furniture and his family; but he himself could not (unless by leave, which he had obtained for one or two days) return to the borough without being guilty

PARLIAMENT—*continued.*

of a breach of duty:—*Held*, following *Ford* v. *Barnes* (16 Q. B. D. 254), that the appellant had not occupied the rooms in the barracks during the qualifying period, and that he was not entitled to be registered as a voter for the borough. SPITTAL *v.* BROOK - - - - - - 426

4. —— *Borough Vote—Lodger Franchise—Old Lodgers' List—Claim to be registered—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 4, *s.* 30, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 24, *s.* 28, *sub-s.* 6—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15).] The claim to be registered is an essential part of the qualification for the lodger franchise.—The voter was on the old lodgers list of voters for a borough for 1885. He made no claim to be registered for 1886: but the overseers, instead of causing the old lodgers list for that year to be printed de novo from the claims served upon them, caused it to be printed from a copy of the old lodgers list in the current register, from which they intended to erase the names in respect of which no claims had been received. They had, however, omitted to erase the name of the voter, and failed to discover the mistake before the list had been signed and published:—*Held*, that the voter was not entitled to have his name retained in the list for 1886. HERSANT *v.* HALSE - - - - - 412

5. —— *Vexatious Opposition to Bill—Costs—Summary Procedure to enforce Payment*—28 & 29 *Vict. c.* 27, *ss.* 2, 3, 5.] Under the provisions of the Act 28 & 29 Vict. c. 27, for the summary recovery by an action of debt of the costs of vexatious opposition to a bill in parliament, the plaintiff, on filing the documents mentioned in s. 5 of the Act, is, unless the defendant has obtained leave from the Court to deliver a defence to the action, entitled as a matter of right to sign judgment for the amount certified by the parliamentary taxing officer to be due to him, but the defendant can after judgment is signed move to set it aside, on the ground that the parliamentary committee, which reported that the opposition to the Bill was vexatious, had no jurisdiction in the particular case.—The defendant cannot deliver a defence to the action without the leave of the Court.—*Semble* (Lopes, L.J., doubting), that leave to deliver a defence, on the ground that the committee had no jurisdiction, may be given before judgment is signed.—Since the Judicature Act a statement of claim is to be used by the plaintiff in place of the declaration referred to in s. 5 of the Act.—The defendants to such an action having, without first obtaining the leave of the Court, delivered a defence denying the jurisdiction of the parliamentary committee:—*Held*, that judgment must be signed for the amount claimed, but that it would still be open to the defendants to move to set aside the judgment.—Decision of Denman and Hawkins, JJ., reversed. MALLET *v.* HANLEY [C. A. 303

6. —— *Vexatious Opposition to Bill—Petitioner to pay Costs—Against whom Order may be made*—28 & 29 *Vict. c.* 27, *ss.* 2, 3, 5.] A bill, promoted by the plaintiff, being before a parliamentary committee, a petition was presented against it in the name and under the seal of a company of which the defendants were directors. The committee reported that the promoter had been vexatiously subjected to expense on the promotion of the bill by the opposition of the defendants, petitioners against the bill, and that the promoter was entitled to recover a portion of his costs from the defendants. The bill of costs was accordingly taxed and a certificate obtained under 28 & 29 Vict. c. 27, and the plaintiff commenced an action and signed judgment for the certified amount. On an application to set aside the judgment and for leave to defend:—*Held* (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), that the defendants not being the actual petitioners, the order on them to pay costs was made without jurisdiction, and could not be enforced. MALLET *v.* HANLEY (2) - C. A. 787

—— Election petition — Trial of — Change of venue—Special circumstances - 548
See PRACTICE. 20.

PART PERFORMANCE—Equitable mortgage—Statute of Frauds—Oral promise—Subsequent oral direction to hold title deeds as security - - - - 766
See EQUITABLE MORTGAGE. 2.

PASSAGE, COURT OF—Power to make rules concerning practice—Rule ordering security for costs—Invalidity - - 510
See LIVERPOOL—COURT OF PASSAGE.

PENALTY—Action for—Interrogatories - 625
See PRACTICE. 8.

PENSION—Indian officer—Sequestration—Appointment of receiver - - 127
See PRACTICE. 15.

—— Indian officer—Voluntary allowance—"Income" - - - - 111
See BANKRUPTCY. 9.

POLICE CONSTABLE—Franchise—Metropolis—Incapacity - - - - 421
See PARLIAMENT.

POOR LAW—*Settlement—Derivative Settlement from Father—Child over Sixteen at Date of Inquiry—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.] A legitimate child left the parish of his birth, and went with his father into another parish, where the father resided and acquired a settlement while the child was under sixteen, and where the child resided with his father until he was over sixteen. Afterwards they left that parish, and the child became chargeable as a pauper.—On appeal against an order adjudging the pauper to be settled in the parish of his birth:—*Held*, that the pauper while under the age of sixteen had acquired a derivative settlement from his father in the parish in which they had resided, and that, not having afterwards acquired any other settlement, he retained such derivative settlement, and therefore the order must be quashed. GUARDIANS OF SAINT PANCRAS *v.* GUARDIANS OF NORWICH INCORPORATION 521

2. —— *Settlement—Widow—Children under Sixteen—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] A widow and her legitimate children, under the age of sixteen, became chargeable to the respondent parish, and an order was made

POOR LAW—*continued.*

for their removal into the appellant union, where the deceased husband and father had been settled: —*Held*, that the word "wife" in s. 35 of the Divided Parishes Act, 1876, does not include a widow, and therefore, as the widow's settlement became the subject of inquiry after her husband's death, she did not take his settlement, and that under the words "shall take the settlement of its father, or of its widowed mother as the case may be," the children took their mother's birth settlement, and, therefore, the order must be quashed.—*Guardians of Maidstone Union* v. *Guardians of Holborn Union* (17 Q. B. D. 817) approved and followed. GUARDIANS OF KINGSBRIDGE UNION *v.* GUARDIANS OF EAST STONEHOUSE - - - 528

POOR-RATE—*Land liable to Assessment taken for Improvements—Deficiency in Assessments—Liability of Promoters to make good—Completion of Works—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 2, 133.] By the Lands Clauses Consolidation Act, 1845, s. 133, the promoters of undertakings who become possessed under statutory authority of lands liable to be assessed to the poor-rate, are liable to make good the deficiency caused thereby "until the works shall be completed and assessed to the poor-rate."—An urban sanitary authority, acting under statutory authority, took for the purposes of improvements lands situate in a number of parishes and liable to be assessed to the poor-rate. In some cases all the land so taken was used in the construction of the roadways of new streets; but in some cases more land was taken than was required for that purpose, so that the sanitary authority became possessed of surplus land which was vacant, unoccupied, and unassessed. Such land was to be disposed of either by sale in fee simple or by the creation of rent-charges which were to be sold within a specified time which had not expired when the rating authority brought an action to recover from the sanitary authority the amount of the deficiency in the assessment to the poor-rate caused by the lands having been taken:—*Held*, that the works were completed within the Lands Clauses Consolidation Act, 1845, s. 133, so as to relieve the undertakers from the liability to make good the deficiency so caused, when the streets were fully made, and such of the lands taken as might be liable to assessment had become assessable:— *Held*, also, that the deficiency was to be computed from time to time by comparing the assessed value at the time of the special Act of the lands taken with the assessed value at the time of computation of such of the lands taken as might have again become assessable.—The authority to put in force the compulsory powers of the Lands Clauses Consolidation Acts was conferred by a provisional order confirmed by a statute which described in one schedule, but under headings separately numbered, the several improvement schemes promoted by the sanitary authority:—*Held*, that each scheme described in the schedule constituted a separate undertaking, and that the deficiency in the assessment ought to be calculated on each separate undertaking within the rating area affected by it. GOVERNOR, &c., OF POOR OF CITY OF BRISTOL *v.* MAYOR, &c., OF CITY AND COUNTY OF BRISTOL - - C. A. 549

POOR-RATE—*continued.*

2. —— *Occupation—Building used for Public Purposes connected with Government—Middlesex Sessions House.*] By an Act passed in 1777 justices were empowered to buy land and build a sessions house, which was not to be rated at a higher figure than the assessment of the site at the date of the Act.—In 1879 the justices, acting under further statutory powers, bought additional land, and built additions and enlargements to the sessions house.—The sessions house with the additions was used solely for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county.—An officer employed in the business of the sessions resided on the premises with his family.—From 1777 to 1879 the sessions house was rated at the assessment of 1777. Afterwards the assessment was raised and the justices appealed:—*Held*, that the buildings being used for public purposes connected with the government of the country were not liable to be rated to the poor-rate, for the case came within the principle of *Coomber* v. *Justices of Berks* (9 App. Cas. 61), and neither the provisions of the Act of 1777, nor the fact that a rate at the valuation named in that Act had been acquiesced in and paid, deprived the justices of their right to contest the rateability of the premises. NICHOLSON *v.* ASSESSMENT COMMITTEE OF HOLBORN UNION - - - 161

3. —— *Rating of Premises with Machinery—Machines used in connection with the Hereditament, but remaining Personal Property.*] In estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon, for the purpose of making them fit as premises for such a manufactory, are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises. TYNE BOILER WORKS COMPANY *v.* OVERSEERS OF LONGBENTON - - C. A. 81

4. —— *Rateable Value—Line leased by Railway Company, Mode of assessing—Leased Line when not to be treated as integral Part of leasing Company's System, but as independent Line.*] A railway company constructed under the powers of their Act a line which formed a connecting link between the lines of three other companies, and for some time retained possession of such line, taking tolls for the use of it by such other companies. Subsequently, by an agreement between the first-mentioned company, therein called "the lessors," and the three other companies, therein called "the lessees," which agreement was confirmed by and was to have the same effect as if its provisions had been enacted in an Act of Parliament, the line was leased to the lessees in perpetuity at an annual rent, and the lessees were by such Act empowered to use, and they did use, such line in connection with their respective systems without payment of tolls. The existence of the said first-mentioned company was continued by the confirming Act for certain purposes, such as the receipt of the yearly rent and its distribution among the shareholders, and there was a provision in the agreement which by necessary implication gave power to the lessees to let the line with the consent of the lessors under seal:—

POOR-RATE—*continued.*

Held, reversing the decision of the Queen's Bench Division, that, having regard to the provisions of the agreement and of the Act confirming it, the rateable value of the line for the purposes of the poor-rate was not to be ascertained as if it were an integral portion of the lines of the three companies using it, but was to be based upon the rent which a tenant from year to year might reasonably be expected to give for it as an independent line. NORTH AND SOUTH WESTERN JUNCTION RAILWAY COMPANY *v.* ASSESSMENT COMMITTEE OF BRENTFORD UNION - - - - C. A. 740

5. —— *Rateable Value—Premises inalienably vested in Trustees for Statutory Purposes—Estimate of Rental — Possible Tenant — Statutory Disability to rent Premises.*] Trustees were incorporated under an Act of Parliament for the purpose of establishing and for ever maintaining a college for educational purposes. They were by the Act empowered to acquire and hold land as a site, and to erect buildings thereon for the college; and they had no power to sell or let the land so acquired. In pursuance of the Act they purchased land in fee simple and erected buildings upon it, which they used for the purposes of such college. Such an institution as the college could not be carried on at a profit in the locality, as the expenses would always exceed the amount to be derived from students' fees. The college premises having been rated to the poor-rate on a gross estimated rental of 3833*l.*, it was found, in a case stated on appeal against the rate, that, if let for any purposes to which (without considerable structural alterations) they were capable of being applied, they would not let for more than 1300*l.* per annum, which would make the rateable value 1083*l.* 6*s.* 8*d.* The trustees were willing to be rated on that rateable value, but contended that they were not liable to be rated on any larger amount. In arriving at this amount the trustees themselves were not taken into consideration as possible tenants of the premises:—*Held*, that (assuming the trustees to be rateable upon more than a nominal amount) in estimating the rental the trustees, being unable themselves to rent the premises by virtue of the statutory provisions, must be excluded from consideration as possible tenants, and therefore the rateable value must be reduced to 1083*l.* 6*s.* 8*d.*—*The Queen* v. *School Board for London* (17 Q. B. D. 738) explained and distinguished. OWENS COLLEGE *v.* OVERSEERS OF CHORLTON-UPON-MEDLOCK - - C. A. 403

6. —— *Tithes in London—Rate on House Property—Commutation for Fixed Annual Payment—Payment in lieu of Tithes—37 Hen. 8, c. 12—43 Eliz. c. 2.*] By 37 Hen. 8, c. 12, provision was made for payment to the clergy in London and their successors of a rate calculated on the rent of the houses. In this and several subsequent statutes the rate was described as "tithes."—A special Act passed in 1881 provided that tithes and sums of money in lieu of tithes in a parish in London should cease and be determined, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum to be charged on the rates:—*Held*, that such annual sum was a personal payment, and was not payable in respect of tithes or payments in lieu of tithes, and therefore

POOR-RATE—*continued.*

was not rateable to the poor-rate under 43 Eliz. c. 2. ESDAILE *v.* ASSESSMENT COMMITTEE OF CITY OF LONDON UNION - - - - 599

POSSESSION—Heir—Action to recover land—Land in occupation of tenants—Statute of Limitations - - - 796

See LIMITATIONS, STATUTE OF.

PRACTICE — *Appeal — Jurisdiction—"Criminal cause or matter"—Property obtained by False Pretences—Pledge of, to Innocent Party—Sale of, by him—Power to order Restitution of Proceeds of Sale in Hands of Agent of Convicted Prisoner—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—24 & 25 *Vict. c.* 96, *s.* 100.] By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the court before whom any such person shall be tried shall have power to order the restitution thereof in a summary manner.—The Queen's Bench Division having discharged a rule for a certiorari to remove an order for restitution made under the above section:—*Held*, that the order of the Queen's Bench Division was a judgment "in a criminal cause or matter" within s. 47 of the Judicature Act, 1873, and that there was no appeal to the Court of Appeal.—*Held*, further, that an order may be made under the above section for the restitution of the proceeds of the property, as well as of the property itself, and that it may be made upon an agent who holds such proceeds for the convict, without notice of the fraud. THE QUEEN *v.* JUSTICES OF THE CENTRAL CRIMINAL COURT [C. A. 314

2. —— *Reference of Action to Arbitration—Costs to abide Event of Award—Award for less than 50l.—Order for Costs—Order LXV., r.* 12.] Where an action of contract has been referred to arbitration under an order by consent providing that the costs of the action shall abide the event of the award, and the sum awarded to the plaintiff does not exceed 50*l.*, a judge at chambers has power under Order LXV., r. 12, to order that the costs shall be taxed upon the scale applicable to actions of contract where the sum recovered exceeds 50*l.* HYDE *v.* BEARDSLEY - - 244

3. —— *Compromise of Divorce Action—Power to make Agreement of Compromise an Order of Court in the Queen's Bench Division.*] An action for judicial separation in the Divorce Division was compromised by the parties, and an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the High Court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the Queen's Bench Division for the purpose of enforcing payment:—*Held*, that there was power to make the agreement an order of Court in the Queen's Bench Division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the Court to make the order had been rightly exercised. SMYTHE *v.* SMYTHE - - - 544

PRACTICE—*continued.*

4. —— *Death of Defendant—Fresh Action against Executors—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Equity of the Statute—Order VIII.—Order XVII.*] A writ was issued, but before it was served the defendant died. Within a year from the proof of the will by the executors of the deceased, a fresh writ was issued against them for the same cause of action. In the meanwhile the period of statutory limitation had expired:—*Held*, that the executors could not rely on the Statute of Limitations as a defence to the action. SWINDELL *v.* BULKELEY - - C. A. 250

5. —— *Discovery—Inspection of Property—Order L., r.* 3; *Order XXXI., r.* 12—*Inspection as between co-Plaintiffs or co-Defendants.*] Order L., r. 3, provides that it shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein.—Claims being made against two defendants severally in the same action:—*Held*, that under the above-mentioned rule inspection could not be granted to one defendant of property belonging to another defendant when there was no right in question as between them in the action.—*Brown* v. *Watkins* (16 Q. B. D. 125) explained. SHAW *v.* SMITH - - - - - C. A. 193

6. —— *Interpleader Summons—Particulars of Claim—Order LVII., rr.* 5, 12.] Where, upon an interpleader summons by the sheriff, a claimant alleges that he is entitled, under a bill of sale or otherwise by way of security for debt, to the goods seized in execution, and an order is made for the sale of the goods and the satisfaction of the claim out of the proceeds of the sale, the claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim on which the order was made. HOCKEY *v.* EVANS - - - - C. A. 390

7. —— *Interpleader—Goods taken in Execution—Right of Third Party.*] On an interpleader issue with regard to goods taken in execution, where the evidence shews that the claimant had not any interest in nor the possession of the goods at the time of seizure, but they belonged to a third person, the execution creditor is entitled to succeed.—On an interpleader issue between the execution creditor and a claimant the facts were as follows:—The claimant, having let the goods afterwards taken in execution for hire, became bankrupt. He did not inform the trustee in bankruptcy that he owned these goods, and the hirer of the goods, being unaware of the bankruptcy, continued to pay the claimant money for the hire of them. The goods, while in the possession of the hirer, were taken in execution under a judgment against him:—*Held*, affirming the judgment of the Queen's Bench Division (17 Q. B. D. 544), that upon the above facts, assuming the execution debtor to be estopped from denying that the goods were the claimant's, such estoppel did not bind the execution creditor, and the claimant had no title to the goods as against the execution creditor, who was therefore entitled to judgment on the issue. RICHARDS *v.* JENKINS - - - - - C. A. 451

8. —— *Interrogatories—Action for Penalties, what is*—3 & 4 *Wm.* 4, *c.* 15, *s.* 2.] By 3 & 4 Wm. 4, c. 15, s. 2, if any person shall, during the continuance of the sole liberty of representing a dramatic piece, represent such piece without the consent of the author, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.*:—*Held*, that this section did not impose a penalty upon the offender so as to preclude the plaintiff, in an action to recover the specified amount, from administering interrogatories to him.—Decision of the Queen's Bench Division affirmed. ADAMS *v.* BATLEY. COLE *v.* FRANCIS - C. A. 625

9. —— *Withdrawal of Juror—Breach of Terms of Agreement to withdraw—Jurisdiction to re-try Action.*] The withdrawal of a juror upon terms is not necessarily the final determination of an action; and if there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the Court before whom the case came for trial has jurisdiction to re-try the action. THOMAS *v.* EXETER FLYING POST COMPANY - - - - - - 822

10. —— *Judgment—Judge's Order by Consent—Failure to file Order, Effect of—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 27—*Judgment not void as against Judgment Debtor.*] The 27th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), provides that a judge's order for judgment made by consent of the defendant in a personal action shall be filed in the Court of Queen's Bench in the manner required by the section within twenty-one days after the making thereof, "otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void":—*Held* (by Lord Esher, M.R., and Lindley, L.J., Lopes, L.J., dissenting), that the effect of non-compliance with the requirements of the section is only to render such an order and judgment void as against the creditors of such defendant, but not as against himself; and, therefore, that a defendant who had consented to such an order could not get the judgment signed upon it set aside on the ground that the order had not been filed in accordance with the section. GOWAN *v.* WRIGHT C. A. 201

11. —— *Mortgage — Attornment Clause — Tenancy created by Mortgage—Action by Mortgagee for Possession—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4, 6, *and* 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9, 13—*Rules of Supreme Court*, 1883, *Order III., r.* 6 (*F*), *Order XIV.*] A mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default having been made, the mortgagee commenced an action for the recovery of the premises, and applied for judgment under Order XIV.:—*Held*, first, that the attornment clause was not rendered void by the Bills of Sale Acts, 1878 and 1882;—Secondly, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Order III., r. 6 (F),

PRACTICE—*continued.*

and the plaintiff was entitled to judgment.—*Daubuz* v. *Lavington* (13 Q. B. D. 347) approved and followed. HALL *v.* COMFORT - - - 11

12. —— *Stay of Execution—Appeal—Jurisdiction of Master to stay Execution pending Appeal—Order LVIII., r.* 16.] A master has jurisdiction under Order LVIII., r. 16, to stay execution on a judgment pending an appeal to the Court of Appeal.—Decision of the Queen's Bench Division affirmed. OPPERT *v.* BEAUMONT - C. A. 435

13. —— *Attachment of Debts—Assignee of Judgment Debt—Garnishee Order—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6—*Order XLII., rr.* 3, 32—*Order XLV., r.* 1.] The assignee of a judgment debt is a person who has "obtained" a judgment within the meaning of Order XLV., r. 1, and is entitled to a garnishee order attaching debts due to the judgment debtor. GOODMAN *v.* ROBINSON - - - 332

14. —— *Discovery in Aid of Execution—Examination of Person other than Debtor—Order XLII., r.* 32.] There is no power under Order XLII., rule 32, when a judgment or order has been obtained for the recovery or payment of money, to make an order for the examination of any person other than the debtor liable under such judgment or order, or in the case of a corporation, other than an officer of the defendant corporation. IRWELL *v.* EDEN - - - - C. A. 583

15. —— *Execution Creditor—Sequestration—Appointment of Receiver—Indian Officer's Pension—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 141.] The pension of an officer of Her Majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve.—*Held*, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that an order appointing a receiver of such pensions was bad.—*Birch* v. *Birch* (8 P. D. 163) approved; *Dent* v. *Dent* (Law Rep. 1 P. & M. 366) distinguished. LUCAS *v.* HARRIS C. A. 127

16. —— *Motion for New Trial—Misdirection—Statement of Grounds in Notice of Motion—Order XXXIX., r.* 3.] A notice of motion for a new trial on the ground of misdirection should state how and in what matter the judge misdirected the jury. PFEIFFER *v.* MIDLAND RAILWAY COMPANY - - - - - 243

17. —— *Security for Costs—Appeal from County Court—Infant Plaintiff—Insolvent Next Friend—Rules of Supreme Court*, 1883, *Order LVIII., r.* 15; *Order LIX., r.* 17.] The plaintiff, an infant, brought an action in the County Court, and sued by his next friend. Judgment was given for the defendants with costs, but they were unable to obtain payment owing to the next friend's insolvency. The plaintiff appealed from the judgment.—On an application by the defendants for an order that the next friend should give security for the costs of the appeal:—*Held*, that by Rules of Supreme Court, 1883, Order LIX., rule 17, which applies the provisions of Order LVIII., rule 15, to appeals from County Courts, there was no power to make an order, and as the next friend was insolvent, and was prosecuting the appeal for the benefit of another person, she must give security. SWAIN *v.* FOLLOWS - 585

18. —— *County Court—Action remitted for Trial—Jurisdiction—Reduction of Claim by Payment or admitted Set-off*—30 & 31 *Vict. c.* 142, *s.* 7—*Admission by Plaintiff.*] By 30 & 31 Vict. c. 142 (County Courts Act, 1867), s. 7, where in any action of contract brought in any of the superior Courts of Common Law the claim indorsed on the writ does not exceed 50*l.*, or "where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds," the defendant may apply to a judge at chambers who may order the action to be tried in the county court.—*Held*, that the section applies where a payment or set-off reducing the claim below 50*l.* appears on the writ to be admitted by the plaintiff, although such payment or set-off is not also admitted by the defendant. PERCIVAL *v.* PEDLEY - - - - - 635

19. —— *County Court—Certificate for Costs on Higher Scale—County Courts Salaries Act*, 1882 (45 & 46 *Vict. c.* 57), *s.* 5—*Prohibition.*] In awarding costs on the higher scale to a successful party under s. 5 of the County Courts Salaries Act, 1882, it is not sufficient for the judge to certify that the action involved a question of character.—Per Stephen, J. A certificate under s. 5 should follow the language of the section.—*Quære*, whether the Court will inquire into the sufficiency of the grounds of a certificate so framed. THE QUEEN *v.* JUDGE OF CITY OF LONDON COURT 105

20. —— *Parliament—Election Petition—Trial of—Change of Venue—"Special Circumstances"*—31 & 32 *Vict. c.* 125, *s.* 11, *sub-s.* 11.] Where the allegations of fact in a parliamentary election are not in dispute, but are specifically admitted by the respondent so as to render it unnecessary at the trial to call witnesses from the district in which the election took place, the Court may order the petition to be tried in London on the ground that "special circumstances" exist within the meaning of s. 11, sub-s. 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which render it desirable that the petition should be tried elsewhere than in the county or division where the election took place. ARCH *v.* BENTINCK [548

21. —— *Writ—Special Indorsement—Statement of Claim indorsed—Date of Delivery—Order III., r.* 6, *App. C., sect.* 4; *App. A., Form* 2.] A writ specially indorsed with a statement of claim need not have the word "Delivered" nor the date of delivery at the end of such statement of claim. VEALE *v.* AUTOMATIC BOILER FEEDER COMPANY [631

—— Abatement—Action—Death of plaintiff—Publication injurious to property—Slander of title - - - 771
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—— Application to set aside award—Valuation when an arbitrator—Umpire appointed on difference between valuers - 7
See ARBITRATION.

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—— County court—Appeal by motion—Order whether final or interlocutory—Appeal to Court of Appeal - - 32
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—— Death of plaintiff—Survival of action—Libel—Publication injurious to property—Slander of title - - - 771
See Executor.

—— Trial at bar—Prerogative of Crown—Action against Board of Trade—Change of venue - - - - - 43
See Crown.

PRINCIPAL AND AGENT—*Authority—Secretary of Company, Representation by.*] The defendants, a tramway company, employed contractors to execute certain works. By the contract the defendants had a right to retain a certain percentage of the amounts for which their engineer from time to time certified on account of the price of the works, until after the completion of the same. The contractors applied to the plaintiffs for an advance upon the security of retention moneys under the contract. The defendants' secretary, in answer to inquiries made by the plaintiffs, erroneously represented to them that there was a certain amount of retention money in the defendants' hands which would be payable after the completion of the works, whereas in fact it was not so. The plaintiffs thereupon advanced money to the contractors on the security of an assignment of the retention money. There was no evidence to shew that the secretary had authority to make the representations which he had made:—*Held*, that it was not within the scope of a secretary's authority to make such representations, and, therefore, in an action by the plaintiffs as assignees of the retention money, the defendants were not estopped from denying that such money was due. Barnett, Hoares, & Co. *v.* South London Tramways Company - C. A. 815

2. —— *Representation by Agent for his own Benefit—Liability of Principal.*] A principal is not liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends.—The secretary of a company answered questions which were put to him as secretary as to the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own benefit. In an action against the company for loss arising from the representations, the jury found that the secretary was held out by the company as a person to answer such inquiries on their behalf;—*Held* (reversing the decision of the Queen's Bench Division) that the company were not liable. British Mutual Banking Company *v.* Charnwood Forest Railway Company C.A. 714

3. —— *Warranty of Authority—Company—Directors—Over Issue of Debenture Stock—Measure of Damages.*] The plaintiff contracted to make a railway, and did work for which he was entitled to be paid cash. The company not being in a position to pay, an agreement was made during the progress of the works by which the plaintiff agreed to accept debenture stock in lieu of cash. The defendants, who were directors of the company, thereupon issued to the plaintiff certificates for the agreed amount of debenture stock, such certificates being signed by two of the defendants. At that time, although the fact was not known to the defendants, all the debenture stock which the company were entitled to issue had been issued, and consequently that which the plaintiff received was an over issue and valueless. The company subsequently went into liquidation, but valid debenture stock retained its par value. In an action to make the defendants personally liable for the amount of the debenture stock which should have been issued to the plaintiff under the agreement:—*Held*, that the defendants were liable on their implied representation that they had authority to issue valid debenture stock which would be a good security, and that under the circumstances the damages were the nominal amount of the stock which the plaintiff ought to have received under his agreement. Firbank's Executors *v.* Humphreys - - C. A. 54

4. —— *Sale of Goods—Broker making Sold-note "for and on account of owner"—Personal Liability of Broker—Evidence, Admissibility of—Usage of Trade to control written Contract.*] The defendants, who were hop brokers, gave to the plaintiffs the following sold-note: "Sold by Ongley & Thornton (the defendants) to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales . . . hops . . . (Signed) for Ongley & Thornton, S.T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make the defendants personally liable on the above contract, and tendered evidence to shew that by the custom of the hop trade brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by the plaintiffs to the defendants to name their principal:—*Held* (reversing the decision of the Queen's Bench Division) that the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial.—*Hutchinson* v. *Tatham* (Law Rep. 8 C. P. 482) considered. Pike *v.* Ongley - C. A. 708

PRINCIPAL AND AGENT—Action to recover land—Statute of Limitations—Receipt of rent by agent—Ratification - 796
See Limitations, Statute of.

PRISON—*Committal of unqualified Person acting as Solicitor—"Criminal Prisoner"—Solicitors Acts: 6 & 7 Vict. c. 73, ss. 2, 32; 23 & 24 Vict. c. 127, s. 26—Prison Acts: 28 & 29 Vict. c. 126, ss. 4, 67; 40 & 41 Vict. c. 21, s. 41.*] A person committed to prison under 6 & 7 Vict. c. 73, s. 32, for acting as a solicitor though not duly qualified is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4. Such a person is not entitled to be treated as a first-class misdemeanant by 40 & 41 Vict. c. 21, s. 41.—So *held*, reversing decision of Denman, J. (17 Q. B. D. 514). Osborne *v.* Milman - - - - - C. A. 471

PROPERTY TAX—Public school—Allowances
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RAILWAY—*Tolls—Undue Preference—Unequal Charges—Traffic Arrangements—Agreement for through Rates between two Railway Companies—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 87, 88, 90.] Sect. 90 of the Railways Clauses Consolidation Act, 1845,—which provides that all tolls charged by a railway company shall be at all times charged equally to all persons, and after the same rate, in respect of all goods of the same description, passing only over the same portion of the line of railway under the same circumstances, and that no reduction or advance in any such tolls shall be made directly or indirectly in favour of or against any particular company or person travelling upon or using the railway,—does not prevent the company from making a special charge for goods carried over their railway, in pursuance of a traffic agreement with another company under s. 87 of the Act. HULL, BARNSLEY, AND WEST RIDING JUNCTION RAILWAY AND DOCK COMPANY *v.* YORKSHIRE AND DERBYSHIRE COAL AND IRON COMPANY **C. A. 761**

2. —— *Carrier—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 7—*Carriage of Dogs—Reasonable Condition.*] A condition, contained in a ticket signed by a person delivering a dog for carriage to a railway company, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of 2*l.* unless a higher value be declared at the time of delivery to the company and a percentage of 5 per cent. paid upon the excess of value beyond the 2*l.* so declared":—*Held*, that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions: and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the Act, and therefore did not protect the railway company from liability to an amount exceeding 2*l.* in respect of damage done to the dog through the negligence of their servants. DICKSON *v.* GREAT NORTHERN RAILWAY COMPANY [C. A. 176

—— Poor-rate—Rateable value—Line leased by railway company—Mode of assessment *See* POOR-RATE. 4. [740

—— Receiving office—Loss of goods—Felonious act of servant - - - 121 *See* CARRIER.

RAPE—Attempt to commit—Evidence of previous connection between prosecutrix and prisoner whether admissible - - 481 *See* CRIMINAL LAW. 3.

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—— Contract — Executor and administrator—Services for benefit of estate - 116 *See* EXECUTOR AND ADMINISTRATOR.

RE-EXCHANGE—Foreign bill—Proof by drawer in bankruptcy - - - 286 *See* BILL OF EXCHANGE.

—— Foreign bill—Proof by drawer - 286 *See* BILL OF EXCHANGE.

RECEIVER—Officer—Pension - - 127 *See* PRACTICE. 15.

RECEIVER, OFFICIAL—Bankruptcy—Scheme of arrangement—Power to oppose discharge of receiving order - - 619 *See* BANKRUPTCY. 6.

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REGISTRAR—Bankruptcy—Approval of composition or scheme of arrangement—Discretion—Review - - - 168 *See* BANKRUPTCY. 4.

—— County court—Fees—Bankruptcy—Consent judgment for sum exceeding 50*l.* 573 *See* BANKRUPTCY. 8.

REMAINDERMAN — Particular estate—Determination thereof - - - 565 *See* LIMITATIONS, STATUTE OF. 2.

RENT—Time when deemed to be due—Agricultural Holdings Act, 1883 - - 642 *See* LANDLORD AND TENANT.

RESTITUTION—Criminal law—Goods obtained by false pretences—Proceeds of sale—24 & 25 Vict. c. 96, ss. 1, 100 - 314 *See* PRACTICE.

—— Criminal law—Goods obtained by false pretences—Sale in market overt—Innocent purchaser—Conviction of thief—Order for restitution - - - 322 *See* SALE OF GOODS.

RETURNING OFFICER—Municipal election—Power to decide as to qualification of candidate - - - - 349 *See* MUNICIPAL CORPORATION.

REVENUE—*Landlord's Property Tax—Allowances—Public Schools—Charitable Institutions—*5 & 6 *Vict. c.* 35, *s.* 61, *Rule VI.*] By s. 61 Rule VI., of 5 & 6 Vict. c. 35, allowances in respect of property tax, levied under Schedule A. of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, or premises" belonging thereto, if occupied under certain specified conditions:—*Held*, that the application of Rule VI. was not limited to public schools maintained wholly by charity, but that the rule applied to a public school maintained partly by charitable endowments and partly by fees charged for instruction. BLAKE *v.* MAYOR, &C., OF LONDON [437

2. —— *Income Tax—Betting—"Vocation"—*5 & 6 *Vict. c.* 35, *Sched. D.*] Persons receiving profits from betting systematically carried on by them throughout the year, are chargeable with income tax on such profits in respect of a "vocation" under 5 & 6 Vict. c. 35 (the Income Tax Act), Sched. D. PARTRIDGE *v.* MALLANDAINE 276

REVENUE—*continued.*

3. —— *Stamp—Revocable Agreement to grant Permission for erection of Jetty — Duty on — 33 & 34 Vict. c. 97 (Stamp Act, 1870), ss. 70, 78, and Sched.*] By an instrument not under seal the Conservators of the Thames agreed to grant permission during their pleasure to the appellants to construct and retain a jetty in consideration of an annual payment yearly so long as the jetty was allowed by the Conservators to remain: —*Held*, that the instrument was not chargeable with stamp duty under 33 & 34 Vict. c. 97 (the Stamp Act, 1870), either as a "conveyance on sale" within s. 70, or as an instrument whereby any property was transferred to or vested in any person, within s. 78, or as a "lease or tack," or "bond, covenant, or instrument of any kind whatsoever," within the schedule, but only as an "agreement." Conservators of River Thames *v.* Commissioners of Inland Revenue - 279

4. —— *Stamp Duties on Accounts—Voluntary Settlement—Reservation of Life Interest—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*).] By deed dated the 12th of July, 1883, the settlor, in pursuance of a power given by articles of partnership, appointed and transferred to his sons his shares in the partnership business, as from the 1st of October, 1883, or as from the settlor's death, which should first happen, provided that such appointments were conditional upon the execution by the sons before the 1st of October, 1883, of a deed covenanting to pay to the settlor, from the 1st of October, 1883, during his life, interest at 4 per cent. per annum on the value of the shares appointed as aforesaid, and to pay, out of the profits, certain annuities to other persons.—The sons executed this last-mentioned deed on the 12th of July, 1883.—The settlor died on the 19th of July, 1883:—*Held*, that the transfer of the shares was a voluntary settlement within the meaning of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2, and that by it an interest for life in the property transferred was reserved to the settlor, and therefore duty was payable under that section on the amount of the shares so transferred. Crossman *v.* The Queen [256

5. —— *Duty on Property of Bodies corporate and unincorporate—Exemption—Property of Club — Entrance Fees and Subscriptions — "Funds voluntarily contributed" — Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11 (6).] Exemption was claimed by a members' club, the property of which was vested in trustees and which had been established less than thirty years, from the duty imposed on the annual value, income, or profits of bodies corporate and unincorporate by s. 11 of the Customs and Inland Revenue Act, 1885, on the ground that the property of the club was "property acquired by or with funds voluntarily contributed" within thirty years preceding, within the meaning of the 6th exemption in that section.—By the rules of the club every member on admission paid an entrance fee and the annual subscriptions for the current year, and until payment was not admitted to any of the benefits or privileges of the club, and payment

REVENUE—*continued.*

was considered as a declaration of submission to the rules; an annual subscription was payable on January 1 in each year, and if it was not paid on or before March 1, the member's name was erased from the list of members, and a member intending to withdraw from the club had to give notice on or before January 1, or otherwise was liable to pay his subscription for the current year:—*Held*, that, as the entrance fees and subscriptions were paid by members in consideration of the right to enjoy the benefits and privileges of the club, they were not "funds voluntarily contributed" to the club, and therefore duty was payable on property acquired with money so paid.—*Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (14 Court of Session Cases, 4th Series, 34) approved. In re The Duty on the Estate of New University Club - - - 720

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RULES OF COURT—Power to make rules concerning practice—Rule ordering security for costs—Invalidity - - 510
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SALE OF GOODS—*Contract induced by False Pretences—Prosecution and Conviction of Fraudulent Buyer—Revesting of Property in Original Owner—Sale in Market overt—Innocent Purchaser—Order for Restitution—24 & 25 Vict. c. 96, s. 100.*] Under 24 & 25 Vict. c. 96, s. 100—which provides that if any person guilty of a misdemeanor in obtaining goods (such as obtaining goods by false pretences) shall be indicted by the owner of the property and convicted, in such case the property shall be restored to the owner or his representative, and the Court before whom any person shall be tried for any such misdemeanor shall have power to award writs of restitution for the property, or to order the restitution thereof in a summary manner;—when a contract for the sale of goods has been induced by false pretences, and the owner of the goods has prosecuted the fraudulent buyer to conviction, the property in the goods revests in the owner on and at the date of the conviction, and he can then recover them from the person in whose possession they are, even though that person had before the conviction bought them in market overt, or otherwise, without notice of the fraud.—It is not necessary as a condition precedent to the recovery of the goods that an order of restitution should have been obtained.—*Moyce* v. *Newington* (4 Q. B. D. 32) overruled.—Decision of Denman, J., founded on that case, reversed. VILMONT *v.* BENTLEY - - - **C. A. 322**

—— Property obtained by false pretences — Pledge to innocent person—Sale by him—Conviction of fraudulent pledgor—Power to order restitution of proceeds of sale - - - - - **314**
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—— Broker making sold note "for and on account of owner"—Personal liability of broker—Evidence, admissibility of—Usage - - - - **708**
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SEQUESTRATION — Pension — Indian officer—Appointment of receiver - - **127**
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SET-OFF—County court—Action remitted for trial—Admission by plaintiff - **635**
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SETTLEMENT — Post-nuptial — Bankruptcy — Solvency of settlor at date of settlement
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—— Voluntary settlement — Stamp duty on accounts - - - - **256**
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SEWER—Vesting in local authority—Alteration of sewerage system—Liability for expenses - - - - **577**
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SHERIFF—Interpleader—Amount recoverable by claimant—Particulars of claim - **390**
See PRACTICE. 6.

SHIP—*Bill of Lading—Quality Marks—Representation—Estoppel—Authority of Master.*] A bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision:—"If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks and more marked with another of such marks indicating an inferior quality than stated in the bill of lading:—*Held*, on the above facts, that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading.—*Grant* v. *Norway* (10 C. B. 665) followed. COX *v.* BRUCE [C. A. 147

2. —— *Charterparty—Bill of Lading differing from Terms of Charterparty—Measure of Damages—Circumstances peculiar to Plaintiff—Advanced Freight "subject to insurance."*] The plaintiffs chartered the defendants' ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom. The charterparty provided that the master was to sign bill of lading at any rate of freight and as customary at port of lading without prejudice to the stipulation of the charterparty. There was also a cesser of liability clause. A cargo was shipped under the charterparty at Alexandria by and on account of the charterers, and a bill of lading was given containing an exception, which was not in the charterparty, protecting the shipowners from liability for damage arising from any act, neglect, or default of the pilot, master, or mariners. The cargo was lost by the negligence of the master. In an action for non-delivery of the cargo, the jury found that there was no special custom at Alexandria with regard to the form of bill of lading in use there:—*Held*, that, whether such finding were right or wrong, the terms of the charter-

SHIP—*continued.*
party did not authorize the giving of a bill of lading containing the before-mentioned exception: and that, even if they did, in the absence of express provision to the contrary, as between the shipowners and the charterers only the charter-party could be regarded as constituting the contract, and the bill of lading must be looked on as a mere receipt for the goods: and consequently that the defendants were liable for non-delivery of the cargo.—The plaintiffs having sold the cargo "to arrive," at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived:—*Held*, that in estimating the damages such market value must be looked to, and not the price at which the plaintiffs had sold the cargo.—The charterparty provided that sufficient cash for ship's disbursements should be advanced, if required, to the captain by the charterers on account of freight, subject to insurance only.—The plaintiffs having advanced sums for ship's disbursements on account of freight as provided for in the charterparty:—*Held*, that in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well. RODOCANACHI *v.* MILBURN - - - **C. A. 67**

3. —— *Charterparty—Cargo to be loaded from Shore at Ship's Risk—Loss after delivery and before loading—Excepted Perils—Limitation of Liability of Shipowner.*] By a charterparty a vessel was to proceed to a port, and there to load a cargo from the shore by the ship's boats and crew at ship's risk and expense. A part of the cargo was lost, after delivery from the shore and before it was loaded on board, through one of the perils enumerated in the exceptions in the charter-party. In an action by the charterer for the non-delivery of this part of the cargo:—*Held*, that the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, and that consequently the exceptions applied, and the shipowner was not liable for the non-delivery. NOTTEBOHN *v.* RICHTER - **C. A. 63**

4. —— *Charterparty—Excepted Perils—"Dangers and Accidents of Navigation"—Collision caused by Negligence of other Vessel—Freight, Deduction of Cost of Cargo short delivered from.*] A charterparty provided that the ship should load a cargo of coal and deliver the same at the port of discharge at a freight of so much per ton on the quantity delivered (the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and navigation always excepted), the freight to be paid two-thirds in cash ten days after the vessel's sailing and the remainder in cash on the right and true delivery of the cargo agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity:—*Held*, that a collision attributable solely to the negligence of those in charge of the other vessel was a "danger or accident of navigation" within the meaning of the charterparty, and therefore that the shipowners were not liable in respect of non-delivery of part of the cargo shipped caused by such a collision; but that the charterers were entitled nevertheless under the charterparty to set off the cost of the

SHIP—*continued.*
coal so undelivered against the balance of freight payable on delivery of the remainder of the cargo at the port of discharge.—*Woodley* v. *Michell* (11 Q. B. D. 47) distinguished. SAILING SHIP "GARSTON" COMPANY *v.* HICKIE, BORMAN, & CO. [**C. A. 17**

5. —— *Charterparty—Marine Insurance—Advanced Freight insured—Right to recover—Subrogation of Insurer to Rights of Assured.*] Goods were shipped on the defendants' ship under a charterparty, which provided that if required the whole freight should be advanced subject to a deduction for interest and insurance. The freight was paid in advance, and the amount was insured. The charterers sold the goods to the plaintiffs at a price covering cost, freight, and insurance. The cargo was lost by the negligence of the defendants.—In an action for the loss of the goods:—*Held*, that the plaintiffs were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified the plaintiffs were entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled. DUFOURCET *v.* BISHOP - - **337**

SLANDER OF TITLE—Death of plaintiff—Survival of action—Publication injurious to property - - - - **771**
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STAMP—Revocable agreement to grant permission for erection of jetty - - **279**
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TRAMWAY—*Paving—Control of Local Authority—Difference between Company and Local Authority—Reference to Arbitration—Croydon and Norwood Tramway Act*, 1883 (46 & 47 *Vict. c. clxxiv.*)—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 33.] By a local Tramway Act, passed after and incorporating the Tramways Act, 1870, the space between the rails and for a distance of eighteen inches beyond each external rail was to be paved by the company to the satisfaction of the local authority for the district with wood or other paving to be approved of by the local authority. On an application by the company the local authority declined to approve of a particular paving, and the company thereupon laid it down without such approval. On an application by the local authority for a mandamus to the company to take up the paving so laid down:—*Held* (affirming the judgment of the Queen's Bench Division), that the powers given to the local authority were subject to the provisions of the Tramways Act, 1870, that a difference had arisen within s. 33 of that Act which ought to be determined by a referee appointed by the Board of Trade, and that the mandamus ought not to be granted. The Queen *v.* Croydon and Norwood Tramways Company - - - C. A. 39

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TROVER—*Estoppel—Conduct—Representation Proximate Cause of Loss—Negligence—Wharfingers' Warrants.*] Goods were in 1875 stored by brokers with wharfingers who issued a warrant stating that this "warrant is the only document issued by us as a legal symbol of these goods," and that after a named date "this warrant alone will be sufficient to obtain delivery."—In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain parties instead of goods to which they were entitled, the defendant not being then aware of this mistake. The warrant had been negotiated and was in January, 1886, in the possession of B. & E. In that month, no rent having been paid since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him as the supposed holder of the warrant and as the person presumedly interested in the goods, that the goods were in hand, that rent was due, and that unless it was paid the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. & E., and applied to the defendant for the goods, when the

TROVER—*continued.*
defendant first discovered that they were no longer in his possession.—In an action to recover damages for a wrongful conversion of the goods:—*Held*, that the defendant was liable, that he was estopped from denying that he had the goods specified in the warrant, for that he had been guilty of negligence in representing to the plaintiff that he had the goods in hand, and that his negligence was the proximate cause of the loss sustained by the plaintiff, who had purchased the warrant in consequence of the statements made by him. SETON *v.* LAFONE - - - - 139

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